
Fletch

ARBITRATIONS:

A

TEXT-BOOK FOR SURVEYORS,

IN TABULATED FORM:

REVISED IN ACCORDANCE WITH THE NEW ARBITRATION ACT,
AND GIVING SUCH ACT IN FULL.

BY

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PREFACE.

THE first edition of this Text-book has been "out of print" for some little time, but professional work has prevented my revising it until now, as its revision involved considerable labour, owing to the passing of the Arbitration Act of 1889, which came into operation in January 1890. This Act I have thought it desirable to print in full, as it is so important a part of the subject, and I have added some new and important cases.

I cannot do better than close this Preface by quoting the concluding paragraph from that which was printed with the first issue of the book:—

"Having spared no pains to make my little work a complete and thoroughly reliable book of reference on the subject of which it treats, I have necessarily drawn largely upon the best authorities, amongst which I gladly acknowledge my obligations to Mr. Francis Russell's most valuable work, and I trust I have succeeded in producing a volume which will worthily supply an undoubted need."

BANISTER FLETCHER.

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Ludgate Circus, E.C.
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THE present might, I think, with great propriety, be termed "the Age of Arbitration." The recommendations of the principle are such that we find it every day more generally adopted as the means of settlement of every class of difference, from the "burning questions" of international importance, to the dispute as to the half-penny per hour, more or less, in the wages of the artisan.

And in the operations of no calling, has the spread of this system been wider or more rapid than in those of the architect and surveyor. This being so, the questions will arise, "What has the architectural profession done to educate or to qualify its members for the parts they are likely to be called upon to perform? What works have eminent members of the profession contributed to the

literature of the subject, or what public discussions have taken place for the mutual interchange of ideas?" I fear the answers to these questions would be unsatisfactory indeed. I know of no work that can be in any way considered as a text-book on the subject. Legal works there are, of great authority and value, but none treating the matter in a simple and practical way, or looking at it, in point of fact, rather from the surveyor's than from the lawyer's point of view. As to discussion, I think the first attempt to bring the subject before our profession in that form was made by myself in a paper read before the Royal Institute of British Architects, in January, 1873. Of course, within the compass of a paper it is only possible to touch, and that but slightly, upon the leading points of a topic, and I did not profess to do more. My principal object was to show the advantages which would accrue to the public from the employment of properly trained surveyors as arbitrators in technical matters, and the probability that this branch of practice would nevertheless fall entirely into the hands of our legal friends, unless our profession bestirred itself to provide for its own members means of obtaining the training necessary to enable them to cope with lawyers on more equal terms. In the result, as some of my readers may be aware, a motion, recommending the establishment of a professional tribunal, was proposed by Mr. J. E. Saunders, supported by Professor Kerr, and carried.

It is in the hope of supplying this want of some volume, containing in a simple and easily accessible form useful information as to the duties of arbitrators and the conduct of arbitrations, that I have prepared this book, in which I have, where it has seemed advantageous, continued that system of "tabulated" information, which formed a novel feature in my works on 'Dilapidations,' and 'Compensations,' and which I am pleased to find has been so generally approved.

In order to assist the reader in arriving at a clear

understanding of our subject, I propose to consider, first, the modes in which arbitrations may arise. These may be divided into three classes:—

By order of a judge, or of the Court, before or in the course of trial.

Under one of the especial Acts of Parliament which provide for the settlement by arbitration of disputes arising under them.

By consent of the parties.

Nothing is more common in an action involving technical questions, after the judge, jury, witnesses, counsel, and solicitors are assembled, the pleadings opened, and the first few introductory sentences spoken by the counsel for the plaintiff, than for the judge to suggest that it is really a matter for arbitration. Usually, after this expression of opinion from the Bench, the case is at once referred, and the arbitrator not unfrequently nominated by the judge.

A reference may also arise under an order made by a judge at Chambers, on the application and by consent of the opposing parties, without going to trial.

The principal Acts which make special provision for arbitration in the event of dispute, are—

The Lands Clauses Consolidation Act, 1845.
The Railways Clauses Consolidation Act, 1845.
The Railway Companies Arbitration Act, 1859.
The Companies Clauses Consolidation Act, 1845.
The Public Health Act, 1848.
The Metropolitan Buildings Act, 1855.

The nature of the provisions in the first five of these may be shortly stated to be that, if a party interested in property proposed to be affected by any undertaking shall signify to the promoters thereof a desire to have the compensation settled by arbitration, it shall be so settled. Such desire must be signified by notice in writing before the promoters have issued their warrant to the sheriff for the summoning of a jury, and must state the interest in

respect of which compensation is claimed, and the amount of the claim. The Metropolitan Buildings Act makes special provision for the settlement of disputes between building and adjoining owners by arbitration, and in these cases the arbitrator cannot be other than a surveyor.

The third (and certainly in my opinion the best) mode in which arbitrations may arise, is by consent of the parties. I say, advisedly, the best mode, because hereby is saved all the enormous cost of preparing for trial; which, if, as is probable, the case is after all referred, is entirely thrown away. It must, therefore, be advantageous to agree at the outset to settle any differences by arbitration.

Formerly a very remarkable point in connection with arbitrations was one the reason or justice of which I confess I did not comprehend. It was that neither at law nor in equity could the fact that an arbitration was pending be pleaded as a bar to an action or suit for the same demand, and this even though the submission be made a rule of a court of common law. The exceptions were, when there was a covenant not to sue (which will suffice to stay proceedings in equity); or, when there was an agreement that "in consideration of the defendant consenting to refer matters in dispute in an action, the plaintiff will accept such agreement in satisfaction of all damage in respect of certain *other matters*, and a reference thereon." This could be pleaded as satisfaction to an action in respect of the last-mentioned matters.

If, however, the submission contained an express stipulation that no action should be brought, the Court would, on application, stay proceedings in any action commenced contrary to such stipulation.

Previous to the passing of the Arbitration Act of 1889 these points applied to England and Wales, but now under the Arbitration Act, 1889 (52 & 53 Vict., c. 4) it is defined that—

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Under the Railway Companies Arbitration Act, 1859 (22 & 33 Vict., c. 59), an agreement to refer between two companies may be pleaded as a bar to a suit.

I think the portion of our subject which it will be convenient to consider next is: "What matters are those which are most likely to be submitted to arbitration," and here the tabulated form may be advantageously adopted.

TABLE I.

Matters for Submission to Arbitration.

Compensation for interests taken for, or affected by, works done under special Acts of Parliament, viz.:—

Enclosing of commons.
Rights of common.
Allotment of lands.
Setting out public roads.
Commutation of tithes.
Definition of boundaries.
Markets.
Harbours.
Docks.
Piers.
Waterworks.
Town improvements.
Cemeteries.
Drainage works.
Railways, whether executed or abandoned.

Compensation for interests taken for, or affected by, work executed by a private individual, or by a company; but not under special Act of Parliament.

Compensation for dilapidations.

Under the Arbitration Act, 1889, England and Wales, it is defined in clause 14 that:

"In any cause or matter (other than a criminal proceeding by the Crown),—

(*a.*) If all the parties interested who are not under disability consent: or,

(*b.*) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers: or,

(*c.*) If the question in dispute consists wholly or in part of matters of account:

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

Among matters which may be agreed to be referred are also any "future differences" which may arise between parties, though none at present exist. Thus, parties may give the arbitrator power to determine on contingent claims, or on matters in dispute, or demands arising after the date of submission.

No difference can be referred to arbitration the subject-matter whereof is illegal. Perhaps it would be more correct to say, if referred to arbitration, no award made on any such matter would "hold."

We may refer to arbitration a claim for compensation where property has been injuriously affected by the works of a railway, though the railway may have been abandoned.

Amongst matters which may be referred to arbitration, and, indeed, for the settlement of which by that means, tages are afforded by special enactments, are dis-

putes between masters and workmen; but these are cases which will rarely concern the surveyor.

The next point useful to consider will be, "Who may refer;" and here another Table may be given.

TABLE II.

Who may Refer.

Any one capable of making a disposition or release of his right.
Any one who can contract.*
(It must, however, be remembered that charities must have the consent of the Attorney-General.)
Femmes sole.
An agent (if authorised).
(The principal alone will be bound, unless the agent expressly bind himself for the performance of his principal.)
Assignees of bankrupts, by consent of creditors.
Attorneys and solicitors.
Counsel.
Executors and administrators.
Trustees.
Committee (or if no committee, the wife) of a lunatic—by permission of the Court of Chancery.
Officer of a public company.

Amongst the parties to a reference may sometimes be included a "third party." It would appear that even if not made a party to the reference, the consent of an individual to the proceedings will, in many cases, preclude him from disputing his obligations to abide by the award. A third party may be added after the reference has commenced, and the arbitration may proceed as if all three parties had been in the original order of reference.

I would here mention a peculiar case, showing how

* If a partner submit for himself and partner, it only binds himself; and further, should his partner refuse to agree, the breach of submission to the award rests with the partner who signed. The other partner is considered a stranger to the award. It must also be remembered that power to sue does not confer power to refer.

acquiescence may render a third person bound by an award. The landlords of two adjoining estates, let on lease, referred to a surveyor to determine and stake out a disputed boundary between the two properties. The tenant of one of the estates, who, though not a party to the reference, by his conduct assented to the staking out of the line by the arbitrating surveyor, was held bound by the decision as if he had been an original party to the submission. (Taylor *v.* Parry, 1 M. and G., 604.)

It should be noted that the acts of an attorney's town agent are as binding on a client as those of the attorney himself. This is not so with the acts of a confidential clerk. An attorney's consent to a judge's order referring a cause being made a rule of Court as to an enlargement of time, is binding on his client. Indeed no consent is necessary on the part of the client. If the attorney consent for time on any point, it is enough.

A bankrupt, by submitting to a reference, binds himself, but not his estate.

Savings banks, friendly societies, and benefit building societies, appear to be bound to refer all matters of dispute, having no other remedy under the statute.

CHAPTER II.

OF THE SUBMISSION — FORM OF SUBMISSION — PARTIES MUST INTEND TO BE BOUND BY DECISION — SUBMISSION IN WRITING — SUBMISSION MUST INCLUDE ALL MATTERS TO BE REFERRED — FORM OF SUBMISSION UNDER ACT — REFERENCE ON "USUAL TERMS" — SUBMISSION MUST REFER TO SAME MATTERS IN MIND OF EACH PARTY — SHOULD BE LEFT WITH ARBITRATOR — COURTS CANNOT AMEND AGREEMENT OF REFERENCE — CONSEQUENCE OF ERROR IN DRAWING SAME.

WE have now seen what matters may be submitted to arbitration, and a goodly list they make; but I venture to think it is not nearly so large as it will be in a few years' time. We have also seen who are the parties who may refer, and have now to consider what is a "submission."

It will be seen by reference to the First Edition that what I predicted would take place has occurred, and that the list of matters to be referred has largely increased.

The submission is the necessary agreement by which the parties agree to submit their differences to the decision of an arbitrator, and formerly the legal authorities agreed it could be made "in any manner that expressed the agreement of the parties to be bound by the decision of the person chosen to determine the matter in controversy." Thus, no formal submission was absolutely necessary, though of course usual. But now in England and Wales by the recent Act, which came into force on the 1st January, 1890, a verbal agreement cannot bind the parties, because in that Act the submission is required to be in writing (clause 27, 52 and 53 Vict.).

> "In this Act, unless the contrary intention appears,—
> 'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

And if no special intention is expressed withdrawing the reference from the Arbitration Act, 1889, the submission will be under the provisions of that Act.

It should be particularly observed that the submission must include and specify all the matters intended to be referred to the arbitrator, as he has no power to deal with any matters not so specified. Indeed, his doing so would, in a majority of cases, as will be hereafter explained, altogether invalidate his award.

The form of Submission in England and Wales under the Arbitration Act is—

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

a. If no other mode of reference is provided, the reference shall be to a single arbitrator.

b. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

c. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

d. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

e. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

f. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may

g. The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

h. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

i. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

The usual terms in England and Wales are those given in the first schedule of the Act, 52 & 53 Vict., and quoted fully above.

A very useful clause, which, though sometimes inserted, does not properly belong to the "usual terms," is one giving to the arbitrator power to direct what he shall think fit to be done by the parties respecting the matters referred, as in clause 9 of the Form of Submission above given.

Whether the submission be parole, or by agreement, deed, or in whatever manner, it is of the highest importance that the same matter should be referred to by both parties, and hence the desirability that the submission should not only be in writing, but that it should be in one document, signed by both or all parties. Should the submission relate, in the mind of one of the parties, to one matter, or one phase of a dispute, and to another in the mind of the other party, not only will the inconvenience arise that the decision will relate to a matter which one of the parties never intended to refer, but, if it can be shown that the parties intended to refer different matters, the award will be altogether invalid. I have in my mind a case where one party appointed an arbitrator to determine a dispute respecting the construction of a lease and the damages sustained, while the other in his appointment alluded only to the construction of the lease, and omitted all mention of the damages; in consequence, the whole award was void.

The submission should be left with the arbitrator, as it is the document which gives him his authority and defines his powers, and he also requires it from time to time for the purpose of making necessary indorsements.

The power of an arbitrator, clause 7, subsection (*c.*), is defined thus,—

> "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—
>
> (*a.*) to administer oaths to or take the affirmations of the parties and witnesses appearing; and
>
> (*b.*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
>
> (*c.*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

CHAPTER III.

OF REVOCATION — FORMERLY MIGHT BE MADE BY EITHER PARTY WITHOUT LEAVE — REASON — CONSEQUENT INCONVENIENCE — LEAVE OF COURT REQUIRED FOR REVOCATION—COURT MAY REVOKE IF ARBITRATION IMPROPERLY OBTAINED — CASES TRIED SINCE INTRODUCTION OF ACT.

HAVING now explained the various methods by which a matter may be submitted to arbitration, it will be well to consider how such submission, when made, may be *revoked.*

It appears that prior to the passing of the 3 & 4 Will. IV., c. 42, the authority of the arbitrator might be revoked at any time before the award was made, at the pleasure of any party to the submission, whether the submission was by agreement in writing, by bond, by deed, by judge's order, by order of Nisi Prius, or by rule of Court, and notwithstanding it was made irrevocable by the express words of the submission. The reason of this was that nothing of less power than legislative enactment could make that irrevocable which was, in the very nature of things, revocable, as the aribitrator being appointed by the consent of the parties to act for them, could no longer act when that consent was withdrawn, and any award made consequent to a revocation was therefore a nullity. Either of two parties to a submission, or, if there were several, any one of them, could, by revoking the authority of the arbitrator, render the submission void as to all, even against the will of his co-plaintiffs or co-defendants.

Great inconvenience and injustice having, however, frequently arisen from this state of affairs, it was enacted

by section 39 of the above-mentioned Act (3 & 4 Will. IV., c. 42) as follows:—

> "The power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court or judge's order, or order of Nisi Prius, in any action now brought, or which shall hereafter be brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall, and may, and is hereby required to, proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference."

Although this Act is now repealed, under the second schedule of the Arbitration Act, it is practically re-enacted because the new Arbitration Act, 1889, provides in section 1 as follows:—

> "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

The only power to set aside the award is given in section 11, sub-section 2, of the Arbitration Act, 1889, which provides that—

> "Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

With regard to the period prior to the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), the death of the arbitrator of necessity revoked the submission. By that Act, however, in case of the death, refusal to act, or incapacity of a single arbitrator, a judge may appoint a new one if the parties do not; and by section 13, where one of two arbitrators fails for the like causes, unless the parties appointing him appoint a fresh arbitrator, the remaining [illegible]may be appointed to act alone.

Although the new Arbitration Act cancels this section, it practically re-enacts it by clause *b* under section 5, as follows:—

(*b.*) "If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

And again in section 6, thus:—

"Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a.*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(*b.*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a judge may set aside any appointment made in pursuance of this section."

We now have to give the cases which have been tried since the Arbitration Act came into operation on the 1st January, 1890, and it will not surprise my readers that they are very limited: up to the date of going to press I have but two cases.

The first was an effort to set aside an award, or refer it back on the ground that an award could be reviewed the

same as the verdict of a jury. The Court held that this was not so, and I think my readers will agree that litigation would have been vastly increased if the Court had taken a different view. I give the case as reported by my friend Mr. Warburton, solicitor.

GROUNDS FOR SETTING ASIDE AWARD.—JUDICATURE ACT, 1873, sec. 58—ARBITRATION ACT, 1889 (52 & 53 Vict., Ch. 49) sec. 15, subsecs. 1 & 2.

By the Arbitration Act, 1889, sec. 15, it is enacted: (1) "In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by rules of Court, and subject thereto as the Court or a judge may direct."

(2) "The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

By sec. 58 of the Judicature Act, 1873, it is enacted that "The report of any referee upon any question of fact shall, unless set aside by the Court, be equivalent to the verdict of a jury."

Application was made to set aside or remit back the award of an arbitrator—a civil engineer—on the ground that the award was not final, but was liable to be reviewed in the same manner as the report of the official referee.

Held, that the 15th section of the Arbitration Act, 1889, had not the effect contended for, and application dismissed. (*Darlington Waggon Co., Limited*, v. *Harding and the Trouville Pier and Steamboat Co., Limited*, W. N. (1890) 182.

The second case, which I give as reported in the daily papers, was an application to revoke a submission on the grounds that in this case the arbitrator had interest which would probably create a bias, and, as will be seen, the application was granted.

QUEEN'S BENCH DIVISION. (Before Mr. Justice WRIGHT and Mr. Justice COLLINS.) IN RE CONTRACTS BETWEEN BARING BROTHERS AND CO. AND DOULTON AND CO.

Sir Charles Russell, Q.C., said he appeared with Mr. Danckwerts in support of an application on the part of Messrs. Baring Brothers for the revocation of a submission to arbitration. The application was

made under section 1 of the Arbitration Act, 1889, which provided that a submission, unless a contrary intention was expressed therein, should be irrevocable, except by leave of the Court or a judge. Messrs. Baring did not allege in this case that any contrary intention appeared in the document itself, but the application was made on the ground that in the circumstances of this case the arbitrator or arbitrators named had interests which would probably create a bias; and also on the ground that the arbitrators named were originally a firm of three persons—Messrs. Bateman, Parsons and Bateman—of whom one of the Batemans had died, whilst the other had retired, only Parsons remaining. Application was made in the first instance to a Master, who on June 17 made an order giving Messrs. Baring leave to revoke, but that order was set aside by Mr. Justice Day, and the present application was by way of appeal against that decision. With regard to the facts of the case, it appeared that the firm of Messrs. S. B. Hale and Co. obtained a concession from the authorities at Buenos Ayres for the construction of certain waterworks and other similar works, and that a company was formed for the working of that concession. Messrs. Hale became contractors under the company for doing the work, and in their turn employed Messrs. Baring Brothers to make contracts for them for the supply of materials manufactured by Messrs Doulton, principally terra-cotta goods, which were to be inspected here and then sent out to Buenos Ayres. Messrs. Bateman, Parsons and Bateman were the arbitrators to whom disputes were to be referred. Baring Brothers, although only agents for Messrs. Hale, contracted as principals for a large portion of the work, and Messrs. Bateman, Parsons and Bateman were to be paid for passing the goods on board ship. Messrs. Doulton had a claim for 5000*l.* against Messrs. Baring, and the main question would be whether they were entitled to be paid a sum of 24,000*l.* as damages in respect of delay. Then there was an action by Messrs. Bateman, Parsons and Bateman against Messrs. Baring for commission. Messrs. Baring, in this proceeding, brought 800*l.* into court, and they also counterclaimed. There was a third action by the arbitrators against Messrs. Hale for commission for inspecting and passing work.

Mr. Justice Wright remarked that if an arbitrator was shown to be interested in the matter in dispute, it would be a strong thing to say that he should be allowed to go on with the arbitration.

Sir C. Russell thought it would, and here the arbitrators were interested in various ways, whilst there was also the point that of the original firm Mr. Parsons alone remained to represent it.

The Hon. Alfred Lyttelton, in opposing the application, said that this was not a case of general or ordinary submission to arbitration, but was a case of special reference to a particular firm, which had superintended the operations of the contracts for three years, and was

alone in a position to deal with all questions that might arise in connection with the contracts. There was nothing to show that Mr. Parsons, who had represented the firm from the first, was likely to be biased in any way. The learned counsel also contended, on the authority of decided cases, that there was no ground on which the Court would be justified in revoking the submission to arbitration. As to litigation, there was simply the bare fact that it had commenced, and there was no evidence of anything like hostile feeling in the matter. He maintained that a submission could only be revoked in the event of misconduct being shown on the part of the arbitrator.

Mr. Justice Wright said disputes had arisen between Messrs. Baring and Messrs. Bateman which had not been foreseen when the arbitration clause was agreed to. That being so, it was competent to Messrs. Baring to say that new circumstances had arisen to justify them in claiming the relief now asked for. There was no ground whatever for imputing any wrong conduct or intention to Mr. Parsons, but circumstances had arisen which rendered him unfit for being arbitrator. There would therefore be leave to revoke as to Mr. Parsons, and the arbitration would go on before some other arbitrator to be agreed upon by the parties or to be named by a judge.

Mr. Justice Collins concurred, and the application was granted, with costs.

There is also a case tried on the 29th April this year which throws light upon the power of the Court to interfere where fraud is alleged. This case arose in 1889, the award being made on 9th May in that year, and therefore before the new Act came into operation, and the ground of the action was, the umpire exceeded his power and that the claim was fraudulent. As will be seen from the report I give, the jury were of opinion that the claim was fraudulent, and the Court thereupon set aside the award, because it is clear that under the new Act similar proceedings would have the same result, as section 11, sub-section 2, provides that an award which has been improperly procured may be set aside.

(Before Mr. Justice WRIGHT and a Special Jury, sitting at Guildhall).

SPENCE v. BIGNOLD.

This was an action by the plaintiff, the assignee of a policy taken out by one Enid Wiedemüller in the Norwich Union Office, to recover

110*l.*, the amount of an award given by an umpire in arbitration in respect of a fire occurring on premises in Gutter-lane on June 22, 1888. The defendants pleaded that the umpire exceeded his power, and that the claim was fraudulent.

Mr. Candy, Q.C., and Mr. E. Hume Williams appeared for the plaintiff; and Mr. Finlay, Q.C., and Mr. Graham for the defendants.

Mr. Candy, for the plaintiff, said that his client by assignment was the holder of a policy for 500*l.* on the defendants in respect of premises occupied at the date of it by Wiedemüller. The facts showed that a month after the insurance was taken out a fire occurred on the premises, and the assured sent in a claim, which was resisted by the company. An action was brought, which was afterwards stayed, and when the present proceedings were in chambers the question was referred to arbitration. The arbitrators were unable to agree, and an umpire, after inquiry, on May 9, 1889, made an award of 110*l.*, being in respect of goods belonging to Wiedemüller and one Chas. Trevor, for whom he held goods on commission. The umpire directed payment of the sum forthwith, but defendants resisted the award, and hence the present action. In the meantime Wiedemüller had parted with his interest in the award to a Mr. White, who on his part had assigned it to the present plaintiff. The material issue between the parties was that Wiedemüller professed to exhibit accounts of the loss sustained which he knew to be false, and the question was how far the defendants, not having taken any steps to set aside the award of May 9, 1889, were now entitled to set up under one of the conditions of their policy an allegation that the whole thing from beginning to end was voided by reason of the fraudulent misrepresentations of Wiedemüller.

The policy and assignments were then put in, after which,

Mr. Graham, on behalf of the company, said that the whole occurrence was remarkable. The fire occurred exactly one month after the insurance, and the original claim sent in was for 93*l.* 3*s.* 11*d.* in respect of Wiedemüller's goods, and 436*l.* 7*s.* 9*d.* in respect of the goods of Charles Trevor, which, it was said, Wiedemüller held on commission. It turned out that at the time Trevor and Wiedemüller were living in one room at a small tavern near. After the salvage had been sorted—the fire being found out and extinguished almost immediately—the services of a Mr. Lewis were retained by Wiedemüller as valuer, and he advised that the claim for 529*l.* 11*s.* 8*d.* could not be sustained; that Wiedemüller had better abandon the claim altogether and take the salvage and make what he could of it.

Evidence was then given which showed that the value of the goods was nothing like the amount first claimed, and that the damage done was not so great as alleged.

The Foreman of the Jury: We are of opinion it is a fraudulent claim.

Mr. Finlay said he would not press the case further.

Mr Candy said he would only say that the only question of any importance, that of fraud, was not gone into before the arbitrators or umpire, and that it was only when a claim was made for payment of the award that the defendants decided to fight the case.

Mr. Justice Wright said he had only to say that the plaintiff could not complain, because the claim under the policy was originally assigned by Wiedemüller to Mr. White, who acted for him, and then assigned to the plaintiff for a debt of 20*l.* and payment of another 15*l.* He thought it was the absolute duty of the defendants to have the matter tested, both in the interests of the public and of their own shareholders.

The jury thereupon gave a verdict for the defendants, having found that it was a fraudulent claim.

His lordship gave judgment accordingly.

Mr. Candy: Under the circumstances, may I ask you to make the order without costs.

Mr. Justice Wright: I have no power unless good cause is shown.

CHAPTER IV.

WHO MAY BE ARBITRATOR — CLASS SOMETIMES SPECIFIED BY STATUTE —MASTERS AND WORKMEN — WHY BARRISTERS USUALLY APPOINTED — LIABILITY OF AWARD BY LAY ARBITRATOR TO BE SET ASIDE — QUALIFICATIONS OF ARBITRATOR—MUST BE INDIFFERENT—LUNATICS AND INFANTS—DEBTOR OR CREDITOR OF PARTY—SECRET INTEREST —BAD FEELING — BIAS OR PREJUDICE — PRIVATE ARRANGEMENT — ARBITRATOR MUST BE INCORRUPT — BUYING UP CLAIMS — ARCHITECT AS ARBITRATOR BETWEEN BUILDER AND CLIENT — ARBITRATOR IN OWN CASE—TABLE III.— METHOD OF APPOINTMENT — REGULATED BY SUBMISSION—ACCEPTANCE NECESSARY TO PERFECT APPOINTMENT — WHERE ARBITRATORS AND UMPIRE EMPLOYED, FORMER CANNOT ACT UNTIL LATTER APPOINTED—MUST NOT BE CHOSEN BY TOSSING-UP—RULES FOR GUIDANCE OF ARBITRATOR—MUST ENDEAVOUR TO DO AS TRIBUNAL WOULD HAVE DONE—MUST LOOK CAREFULLY TO SUBMISSION—ARBITRATOR NOT ALWAYS BOUND BY STRICT RULES OF PRACTICE—MAY ALLOW INTEREST—MAY EVEN DISREGARD THE STRICT LAW—LIMITS OF TIME FOR ADMISSION OF MATTERS—CLAIMS ARISING AFTER DATE OF WRIT—EXAMPLES—DURATION OF ARBITRATION— AWARD MAY BE MADE ON DATE OF SUBMISSION—TIME ALLOWED UNDER ARBITRATION ACT—HOW TIME MAY BE EXTENDED—WHERE TWO ARBITRATORS AND UMPIRE, DUTY OF LATTER IF FORMER DO NOT AWARD WITHIN PROPER TIME—BY LANDS CLAUSES CONSOLIDATION ACT TWO ARBITRATORS MUST AWARD WITHIN TWENTY-ONE DAYS — OF ENLARGEMENT — ARBITRATOR CANNOT EXTEND TIME NAMED UNLESS UNDER SPECIAL POWER—FORM OF ENLARGEMENT— WHEN ARBITRATOR NOT LIMITED TO ONE ENLARGEMENT—UNDER LANDS CLAUSES CONSOLIDATION ACT TWO ARBITRATORS MAY ENLARGE TIME TO THREE MONTHS—EXTENSION BY CONSENT—ATTENDANCES WHEN NO PROPER ENLARGEMENT—POWER OF COURTS TO ENLARGE TIME—DIFFERENCE BETWEEN SAME AND THAT OF ARBITRATOR— TABLE IV. — ARBITRATOR'S POWERS AS TO LIMITS OF ARBITRATION.

WE now approach, perhaps, the most important part of our subject, viz. the consideration of who may be an arbitrator, the method of his appointment, his duties and qualifications, and the principles which should guide him.

Sometimes the class from which the arbitrator for settling particular disputes should be selected is indicated by statute, as under 5 Geo. IV., c. 96, by which it is enacted that the referee for settling, by arbitration, disputes between masters and workmen, is to be a justice of the peace, if the parties can agree on one; if not, there are to be two arbitrators, one a master, or the agent or foreman of a master, and the other a workman in the calling respecting which the dispute has arisen.

I alluded in a former chapter to the subject of disputes between masters and workmen, saying that though by special Acts they were made subjects for arbitration, they were not likely much to concern the surveyor. Here, again, it would almost seem that, from the apathy of the profession, or from some other cause which would surely be worth while to try to discover, a class of work for which, in certain cases, no one should be so qualified as the surveyor, had fallen into other hands. In the numerous, frequent, and lamentable contests between labour and capital, to which no callings are more subject than the building trades, who so fit a person to hold the scales of justice as the surveyor—the man who, acquainted with the nature of the interests involved, the class of parties concerned, the qualifications called into requirement, the nature and value of the services rendered, is yet a partisan to neither side, though a friend to both? The ever-raging warfare between the two great elements in the economy of our commercial system might, and indeed does, form a fruitful subject for the essays of the philosopher. Even the late Lord Beaconsfield had his pet theory on the matter, attributing the discord which is continually making itself apparent by "strikes," to, I believe, the depreciation in value of gold. With such abstract theories we have nothing to do, but with the practical and business portion of the subject the architect and surveyor is intimately concerned. In his own proper he is one of the chief sufferers by the stagnation

which is ever and anon caused by a "difference" between the operatives in some particular department of the building trades and their employers. In the inconvenience occasioned, not only to himself, but to his clients, by the occurrence of a strike during the progress of building operations under his superintendence, he is again made aware of his interest in the dispute. And this being so, why, I ask, should not the architect, having so close a connection with the matters in difference, accustomed, as he is, to act as arbitrator between clients and contractors, and accustomed, too, as he is (or should be) to weigh the evidence and facts, and form an impartial opinion thereupon, be the person customarily selected as arbitrator in such disputes?

The foregoing paragraph appears in the previous edition of this book, and I am glad to find the advice then given has been followed.

My readers will remember the very long and serious strike in the carpenters and joiners' trade in London which extended over so many months and which appeared to be incapable of settlement till the parties agreed to refer their dispute to the President of the Royal Institute of British Architects, whose award up to this date has been honourably observed by both parties.

The difficulties of the position must not be overlooked nor lightly estimated, for there is one grand distinction between awards given in disputes of this character and those of arbitrators appointed to decide an action-at-law. This is, that in the latter case the award can be enforced, but in the former there is no guarantee beyond the good sense and honourable feeling of the parties, that they will abide by the arbitrator's decision. He is therefore in this truly dignified but difficult position, that he must convince both sides of the justice of his decision, to secure for his award respect and obedience. Truly this is a glorious responsibility, and happy the man that can rise to the greatness of the occasion. Patience, clear-headedness,

impartiality, the dignified maintenance of due authority—all must be called into play. Great is the difficulty, heavy the responsibility, but glorious the reward.

While on the subject of "Who may be an arbitrator," it may not be inappropriate to offer a few reflections as to why barristers are so universally selected to fill the post of arbitrator in cases involving surveying and other technical questions. No doubt the one great advantage they possess is that they are, from their training, adepts at the conduct of an inquiry, and acquainted with the laws which should govern the receiving or rejecting of evidence. But these are qualifications which study and observation will impart equally to the surveyor, who possesses over the barrister the immense advantage of a technical knowledge, which is the result not only of much study, but of long experience, which the legal gentleman of course cannot have, and therefore it is that I would endeavour to incite the members (especially the younger ones) of my profession to apply themselves to the attainment of those qualifications, which, added to their own peculiar knowledge, should make them much better fitted than any mere lawyer to act as arbitrators in cases bearing on their own profession. While admitting the very great talent to be found at the bar, still, judging from the statements of barrister-friends of my own, I think it would be generally admitted, even amongst lawyers, that they cannot decide on technical matters so readily or so well as an expert.

An arbitrator should be a person who stands indifferent between the parties. He is a person selected by the mutual consent of parties to determine disputes between them, and hence arises the curious point, that even lunatics or infants are not legally disqualified for the office, for every person is at liberty to choose whom he pleases, and if parties prefer to select such an arbitrator,

they cannot afterwards object to the deficiences of the person they have themselves selected.

Owing a debt to, or being a creditor of, one of the parties does not disqualify a person from filling the post of arbitrator; but if he have any secret interest in the subject in dispute, or any bad feeling towards either party, he is not a proper person to be a judge between them. It appears that if an arbitrator uses any expressions towards either side which indicate a strong bias or predjudice, or shows that he is actuated by any hostile feeling, the award may be set aside; and this may be done even where there is no cause for impeaching the conduct of another arbitrator who has joined in the award.

An arbitrator should not enter into a private agreement ("Chichester *v.* M'Intyre," 1 Dowl. N.S., 460) with a party respecting the subject of reference. In this case the arbitrator arranged that the tenant should lay out a large sum of money upon certain premises, and took into consideration such outlay in his award, though the landlord had no power to enforce the outlay. The decision of the Court on the award was, that, being *bonâ fide*, it was good in law, but objectionable.

An arbitrator must, of course, be incorrupt, and must not take money for his charges from one of the parties without any bill delivered, or before the making of the award. In such a case the award has been set aside. Nor may he buy up the unascertained claim of any party interested; such a proceeding would, as the law authorities say, "corrupt the fountain, and contaminate the award."

It is held, however, that an architect employed by a client to superintend a builder in building his house, may be an arbitrator between his employer and the builder, although his remuneration is a commission on the amount of the builder's charges.

It is an interesting point that a party may even be an

arbitrator in his own case, if his opponent agree to his deciding the dispute, and the Courts will not over-rule his decision, even though it be in his own favour.

In order to set before my readers the essence of the information I endeavour to furnish in as handy a form as possible, I will now give the substance of the foregoing remarks in the form of a Table.

TABLE III.

Qualifications of an Arbitrator.

Should be indifferent between the parties.
Should enter into no private arrangement with any one respecting the matter in dispute.
Must have no secret interest in the issue.
Must have no bad feeling towards either party.
Must use no expressions indicating bias.
Must be incorrupt.
Must not take money for his charges before award is made.
Must not buy up unascertained claims.
Is not legally disqualified if an infant or a lunatic.
Is not legally disqualified if a debtor or creditor of one of the parties.
Is not legally disqualified from arbitrating in his own case.

The method of appointment of the arbitrator is, as will have been seen, usually regulated by the "submission," which contains a clause referring to his appointment. Where arbitrators are to be named after disputes shall have arisen, if one party says, "I appoint A. as the arbitrator on my behalf, pursuant to such-and-such an agreement," this is sufficient. The appointment need not recite or refer to the matter in dispute.

It appears, however, that acceptance of the office by the person nominated is necessary to perfect the appointment. I will here give a hint which may be useful. Where there are to be two arbitrators and an umpire between them, and you are appointed an arbitrator, and

have knowledge of the appointment of the arbitrator on the other side, arrange an *early* meeting to settle method of procedure, and especially to nominate the umpire; for *until* he is appointed, the law holds that no acts of the arbitrators are good. In these cases there is much technicality to be observed; for instance, the appointment of one of the arbitrators is not complete until it has been notified to the other side. You will notice the importance of this, because if (as is very usual) the appointment is to be made by a certain day, it will be *too late*, though the arbitrator be nominated on the appointed day, if information thereof be not given to the other side until the day after.

It is worthy of note that an arbitrator or umpire must not be appointed by the simple (though, perhaps, plebeian) method of "tossing-up"; the Courts having decided that the appointment must be the result of choice, not chance. The same objection will, therefore, of course apply to drawing lots. It is well to know this, as the temptation to seize so short a road out of a difficulty as that presented by the "hazard of the die," is frequently great. It appears, however, that where each party nominated a person who was admitted by the other to be fit and proper and the selection between the two persons so nominated was made by tossing-up, it was held that the appointment was good. And it is also clear that an appointment by lot may be made good by consent of the parties to the reference, provided they have full knowledge of the circumstances. If the person appointed as umpire refuse to act, the arbitrators may appoint another, and where an umpire has once been properly appointed by the arbitrators, his appointment will in no way be affected by the disapproval of the parties. Where the form of appointment of umpire by the arbitrators is set forth in the submission, no doubt will arise.

Coming now to the consideration of the principles which

should guide an arbitrator in the discharge of the duties appertaining to his office, we find that the best authorities give as a general rule for his direction that "he should endeavour to arrive at his conclusions upon the same rules and principles as would have actuated the tribunal for which he is substituted." He must also look carefully to the terms of the submission, as the document which confers his powers, and endeavour therefrom to gather the intentions of the parties. Thus, if the submission refer to "all matters in difference" between certain parties, it would be competent for the arbitrator to exercise equitable, as well as strictly legal, powers, as, for instance, to decide according to his opinion of the intention of a certain deed in which there is an error; while if he be called upon to decide only upon the construction of the deed, he would be bound by the actual terms contained therein.

An arbitrator is not always bound by the strict rules of practice adopted in the Courts. Thus, he may allow interest in taking an account between parties, though a well-known rule would prevent this being allowed by the Courts.

It even appears clear that an arbitrator, knowing the law, may, in order to make what he considers to be, under all the circumstances, an equitable decision, absolutely disregard the law, and it will be no objection to his award that in some particular point it is manifestly against law.

As regards the time up to which matters in dispute occurring come under an arbitrator's jurisdiction, it appears that under a submission of "matters in difference in a cause," he is not justified in dealing with a claim arising after the date of the writ, as he can decide upon nothing but what could be recovered in the action. Special provision in the submission, however, may give him jurisdiction over matters occurring subsequent to the

commencement of the action, and in cases also where there is no action parties can give an arbitrator power to decide on contingent claims or matters in dispute arising after the date of submission.

A frequent instance of this is where it is left to the arbitrator to decide as to the costs of the reference and award, all of which of course accrue after the date of the submission.

A case worthy of note is one in which a railway company had taken certain lands and held them some years. An arbitrator, appointed to settle the price to be paid, and to direct conveyances, was held entitled to consider all clains for mesne profits up to the time of making his award.

As regards the duration of an arbitration, or the time within which the award must be made, formerly, where the submission stated no time, it appears that the arbitrator could, if he so pleased, and if the circumstances permitted of his doing so, make his award on the very day on which the submission was executed; while, on the other hand, under the Common Law Procedure Act, 1854, s. 15, an arbitrator was compelled to (unless the document or order conferring his authority specify a certain limit) make his award within three months from the date at which he commenced his judicial inquiry into the case. The parties, however, by consent in writing, or the Court of which the document or order had been made a rule, could upon good cause shown, extend this time; and, if no period was stated for the extension, it was deemed to be for one month.

Where there were two arbitrators and an umpire, and the arbitrators had allowed their time, or extended time, to elapse without making an award, or shall have stated in writing that they cannot agree, the umpire then entered upon the reference in lieu of the arbitrators.

In England and Wales the above Act has been repealed

under schedule 2 of the Arbitration Act, and it is now enacted in the Arbitration Act, 52 & 53 Vict., and in the 1st schedule and clauses *c*, *d*, and *e*, that—

> *c.* "The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.
>
> *d.* If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.
>
> *e.* The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award."

An arbitrator cannot himself fix a limit for making his award if the submission give him no express power to do so.

When a certain limit is fixed by the submission for making the award, the expression "within" includes the last day of any given term. Thus, if an award is to be made "within three months from the 25th of March," it will be sufficient if it be made on the 25th of June. And if the time given be "until" a certain day, the award may be made at any time during that day, If the limit be expressed to be merely a certain number of "months," without anything to show an intention to the contrary, the term must be computed by lunar months.

By the Lands Clauses Consolidation Act, 1845, the award of two arbitrators, neither of whom refuses or neglects to act, must be made within twenty-one days after the appointment of the last of the two.

Under the same Act, the two arbitrators previously mentioned, whose original powers are limited to twenty-

one days, have a power of extension to three calendar months, but no further.

Even where the submission contains no power of enlargement of the time, or where it contains such a power, and, through it not being exercised, the time has elapsed, an extension may be made by consent of the parties. Indeed, the conduct of the parties will sometimes be taken to amount to a consent to enlargement, and a consequent revival of the arbitrator's powers. As the consent virtually amounts to a new submission, the enlargement should in every case be made by a deed of the same character as the original submission. If parties knowingly attend meetings after time has expired without proper enlargement being made, and make no objection, they cannot afterwards claim that the arbitrator's authority was at an end.

Formerly, neither the Courts nor a judge could enlarge the time when lapsed, without the consent of the parties; but by 3 & 4 Will. IV., c. 42, it was enacted, that the Court, or any judge thereof, may from time to time enlarge the term for the making of his award by an "arbitrator, or umpire, appointed by or in pursuance of any rule of Court or judge's order, or order of *Nisi Prius*, in any action now brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of Record."

As before mentioned, this Act has been repealed, and now in England and Wales, under the Arbitration Act, clause 9, it is provided that:

> "The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not."

It is necessary to note a difference between the enlarging powers of an arbitrator and of the Court. The arbitrator must exercise his power within the time

originally given for the making of his award; but the Court may enlarge a period at any time it thinks proper, and the effect will be to render valid any acts which would otherwise, from the lapse of the original period, have been void.

The substance of the foregoing remarks will be found in the following Table:—

TABLE IV.

Arbitrator's Powers as to Limits of Arbitration.

Must not deal with matters arising after date of writ, unless by special authority.
May make his award on date of submission, if no special time stated therein.
Under the Arbitration Act must make award within three months, unless special arrangement otherwise.
Cannot extend stated time unless by special power.

CHAPTER V.

POWERS OF THE ARBITRATOR—AS TO NAMING TIME AND PLACE—WHERE SEVERAL PARTIES, ARBITRATOR NO AUTHORITY TILL ALL HAVE EXECUTED SUBMISSION—ARBITRATOR MAY REVOKE APPOINTMENT WHEN MADE—ARBITRATOR MAY INSIST ON PARTY'S ATTENDANCE THOUGH INCONVENIENT—INTENTION TO EMPLOY COUNSEL SHOULD BE NOTIFIED—PROCEEDINGS SHOULD RESEMBLE TRIAL IN COURT—ARBITRATOR MAY REFUSE TO HEAR COUNSEL—MAY REFUSE TO ALLOW ASSISTANCE OF SKILLED STRANGER—MUST NOT RECEIVE EVIDENCE IN ABSENCE OF OPPOSITE PARTY—MUST NOT EXCLUDE PERSONS DESIRED BY PARTY WITHOUT JUSTIFICATION—MAY TAKE EVIDENCE AT HOUSE OF WITNESS UNABLE TO ATTEND—BRIEFS SOMETIMES LEFT WITH ARBITRATOR BEFORE HEARING—ADVANTAGES OF THIS COURSE—UNDER CERTAIN ACTS ARBITRATOR MUST MAKE DECLARATION—ARBITRATOR MUST NOT CLOSE PROCEEDINGS HASTILY—MUST GIVE PARTY TIME TO GO INTO CASE EVEN AFTER UNNECESSARY DELAY—ALSO TO INVESTIGATE UNEXPECTED CASE—SHOULD TAKE WRITTEN NOTES—HAS POWER TO CALL FOR ALL BOOKS AND PAPERS—MUST NOT RECEIVE PRIVATE COMMUNICATIONS FROM EITHER SIDE—DANGER OF SO DOING—IRREGULARITIES OF ARBITRATOR MAY BE CONDONED BY PARTIES—WHEN ARBITRATOR MAY PROCEED EX PARTE—WHEN ARBITRATOR IN DOUBT AS TO ADMISSIBILITY OF EVIDENCE—ARBITRATOR NOT CONFINED TO EVIDENCE ON MATTERS SUBMITTED—ARBITRATOR MAY APPLY TO COURT FOR ADVICE—ARBITRATOR'S POWER OF AMENDING ERRORS IN RECORD—ARBITRATOR MUST NOT DELEGATE DUTIES—MAY TAKE OPINIONS—LAY ARBITRATOR MUST NOT EMPLOY SOLICITOR TO SIT WITH AND ADVISE HIM IF OBJECTED TO—LAY ARBITRATORS MUST NOT SURRENDER THEIR OPINIONS TO THAT OF LEGAL ARBITRATOR.

LET us now consider that the arbitration has arisen in some one of the ways indicated in our first chapter, and that the arbitrator is appointed. What will be the nature of the proceedings, and of his duties, at the first meeting?

Providing the arbitrator acts within his authority, and with due impartiality, his word is law as to the mode in

which the reference shall be conducted. It lies entirely with him to direct the time and place of meeting, and it is the duty of the parties to obey. It is very usual for the party wishing to proceed with the reference to wait upon the arbitrator with the submission, and request him to appoint a meeting. If an arrangement cannot be made convenient to all parties, it will be for the arbitrator to make an appointment, and give full particulars thereof in writing to the party applying, who will serve a copy upon his opponent.

I should mention that, where there are several parties to a submission, the authority of the arbitrator does not commence until all have executed it; and he has no power to decide on a separate issue between two of the parties, even though they may have signed, while there are others who have not.

The arbitrator should not fix on too early a day, as the parties have to get up their cases; on the other hand, too distant an appointment may inflict damage on the party entitled to recover. And even when the appointment is made, the arbitrator may revoke it if he see sufficient cause. If either party give timely notice to his opponent, and to the arbitrator, that he cannot, or that it will be inconvenient for him to attend, the arbitrator may either insist on his attendance or make another appointment as he shall think fit.

An intention by either side to employ counsel should be notified to the opposing party, to give him an opportunity of doing likewise. In a case where no such notice was given, and the arbitrator refused to grant a postponement asked for by the party who had no counsel, in order that he might obtain that assistance, the Court annulled the award, on the ground that the arbitrator had not acted fairly between the parties.

An arbitrator will do well to endeavour to assimilate the proceedings before him as nearly as possible to a trial in Court. It is, therefore, usual and proper for the parties to be represented by their attorneys or counsel, and to appear with witnesses to support their respective cases. It appears that arbitrators have the power to decline to hear counsel if they think fit, though it would probably be unwise to exercise it.

Where an arbitrator refused to allow a stranger, skilled in the matters in dispute, to assist the attorney of one of the parties, the Court held he had not exceeded his powers. It has even been said that, under very peculiar circumstances, an arbitrator would be justified in excluding the parties and their attorneys, and examining the witnesses himself. On the other hand, a party may properly apply to have an arbitration stopped if the arbitrator receive evidence against him behind his back, even although the arbitrator inform him of the evidence, and re-hear the witness in his presence.

Where certain persons, whose attendance one of the parties wished to have, were excluded without sufficient justification being shown, the award was set aside on the ground that the party's interests might have been unfairly prejudiced.

It is competent for an arbitrator to take the evidence of a person who is physically unable to attend, at that person's own residence.

A point in which arbitrations differ considerably from trials in Court is the custom (by no means infrequent) of both parties leaving their briefs with the arbitrator before the first hearing. He is thereby familiarised with the nature of the case on either side, and the proceedings are much shortened, as fewer observations of counsel will suffice in setting the facts before him.

It should be noted, that under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, an arbitrator must, before entering upon his duties, make and subscribe a declaration in the presence of a justice of the peace (not necessarily of the county in which the matter in dispute arises), in a certain form prescribed by the Acts, that he will decide honestly and to the best of his ability.

An arbitrator must be careful not to close a reference too hastily; and even though a party may have occasioned unnecessary delay, the arbitrator must not make his award without giving the party due notice, and an opportunity of properly going into his case. Even when the time for making the award had expired, excepting two or three days, and the arbitrator refused a request to defer making his award until a party satisfied him as to certain matters, the award was set aside. An arbitrator must allow time for a party to investigate an unexpected case set up by his opponent.

It is very desirable that an arbitrator should carefully take written notes of the evidence, for comparison of a witness's examination-in-chief with his cross-examination and of the evidence of different witnesses. They will also be useful if proceedings are afterwards taken on the award.

The arbitrator (by the order of reference) has power to call for all books and papers which he may require, and compliance with his demands may be enforced by attachment. See first schedule, clauses *f* and *g*.

Too much stress cannot be laid on the desirability of an arbitrator receiving no private communications from either side, and of hearing no evidence except in the presence of the opposite party. The dangers of an annul-

ling of the award incurred by so doing are very great; for though there are decisions on either side, the preponderance of feeling, both in the Common Law and Chancery Courts, appears to be against upholding awards in references where such irregularities have been committed.

It is important to remember that any irregularity on the part of the arbitrator may be condoned by the parties, and will not vitiate the award if the parties or the party aggrieved by the irregularity can be shown to have had full knowledge thereof, and by their or his conduct to have waived any objection thereto. If, for instance, a party attends meetings after knowing that certain witnesses have been examined in his absence by the arbitrator, and makes no objection to what has been done, he will be held to have waived the irregularity. If however, a party appears before an arbitrator and protests against his authority, and, that protest being overruled, proceeds to cross-examine his adversary's witnesses, or to call witnesses on his own behalf, he may subsequently appeal against the award as being void, providing his objection to the arbitrator's authority be well founded. A party may not, of course, quietly wait, reserving an objection until he sees what chance he stands of obtaining an award in his favour, and then, when he finds it unfavourable, attempt to upset it on the ground of irregularity. And in all cases where an irregularity has occurred, it is open to the arbitrator to set matters right by apprising the parties of the defect, and obtaining their acquiescence in such a fair and reasonable course as seems likely to remedy the evil without injury to either party.

With regard to the proceeding with a reference in the absence of one of the parties, although, as has been previously pointed out, such a course is highly injudicious and dangerous where both sides are willing to comply with the terms of the submission, it is open to the arbi-

trator (and, indeed, imperative upon him), in the case of a recalcitrant party, who, having been duly summoned neglects to attend, with a view to defeating justice, to give him notice of the time and place where he (the arbitrator) intends to proceed with the reference, and so to proceed in his absence if he still neglect to attend. An arbitrator may also proceed *ex parte* where a party refuses to attend after having unsuccessfully attempted to revoke the submission on the ground that the arbitrator had no authority. In all cases of proceeding *ex parte*, however, the arbitrator must be careful not to do so without giving the refractory party due notice of his intention. And even after a party has refused and neglected to attend several meetings, still due notice should be given him of all further meetings held up to the conclusion of the reference, to give him an opportunity of changing his mind if he thinks fit.

An erroneous decision by an arbitrator on a point of evidence, such as the admissibility of certain documents or the propriety of allowing proof of certain facts, will not invalidate an award; but a refusal to hear certain evidence under a mistaken impression that it refers to matters not within the scope of the reference will be considered as an omission to decide on all matters submitted, and will be fatal to the award. Therefore, if a doubt arise as to whether a certain matter is within the reference, the arbitrator will do well to receive the evidence, and deal with the doubtful matter in his award separately from the others. In this way, if the matter should properly have been excluded, his award will be bad only as regards that matter, and will hold good as to the rest, while had he omitted to deal with all that *should* have been included, the mistake would be fatal to the whole.

An arbitrator is not bound to confine himself to evidence upon the matters submitted for his decision, if inquiry

into collateral subjects be necessary to enable him to arrive at a right decision. In some cases the arbitrator has power, under the terms of the reference, to apply to the Court for directions on any subject on which he may be in doubt, when his proper course will be to "state a case" setting forth the necessary facts. An arbitrator's power of amending errors in the record will depend on the terms of the submission.

Although an arbitrator may not delegate his duties* to any other person, but must perform them himself, he may take the *opinion* of others upon certain questions affecting the merits of the case before him. Lord Alvanley, upon this point, said, "A man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he choose to adopt it." An arbitrator may therefore avail himself of the assistance of persons specially skilled on any point wherever he may feel he stands in need of it. At the same time he must not place a blind and implicit faith in the opinion so given him, but only use it in forming his own judgment; and the obtaining of such assistance will not relieve him from his obligation to hear evidence on the points in question.

If a legal arbitrator be objected to, and a layman be appointed, either party may successfully object to his employing an attorney to sit with and advise him. Even if he employ an accountant, he must give the parties an opportunity of objecting.

Where there are two lay and one legal arbitrators, the laymen must not leave it entirely to the lawyer to decide even the points of law, so as to *surrender* their own opinions to his, but must only make use of his superior legal knowledge to *aid* them in forming their own decisions. (Sharp *v.* Howell, 6, C.B., 253.)

* This applies to judicial duties only, as it appears clear that acts such as the measuring of land, &c., may be performed by deputy.

It does not appear that the assistance of a skilled perso to advise the arbitrator need necessarily be sought *with th knowledge of the parties*, though it would no doubt be mor judicious on the arbitrator's part not to conceal the fac from them.

CHAPTER VI.

OF JOINT ARBITRATORS AND UMPIRES—PROVISIONS OF NEW ARBITRATION ACT—APPOINTMENT OF UMPIRE MUST BE SIGNED BY BOTH ARBITRATORS TOGETHER — JOINT ARBITRATORS MUST FORM THEIR OWN OPINIONS INDEPENDENTLY—SHOULD NOT BE TOO STUBBORN—ACTS OF JOINT ARBITRATORS INVALID UNLESS DONE IN CONCERT — IF THIRD PERSON TO BE APPOINTED, ALL ACTS OF JOINT ARBITRATORS INVALID UNTIL APPOINTMENT MADE — "UMPIRE," PROPERLY SO CALLED — SOMETIMES NAMED IN SUBMISSION — MUST DECIDE ON ALL POINTS, IF ON ANY — PROVISIONS OF VARIOUS ACTS AS TO UMPIRES — COMMENCEMENT AND LIMIT OF TIME FOR MAKING AWARD BY UMPIRE—PROVISIONS OF LANDS CLAUSES CONSOLIDATION ACT IN EVENT OF UMPIRE FAILING TO MAKE AWARD — METHOD OF PROCEDURE UNDER METROPOLITAN BUILDINGS ACT—UMPIRE MUST NOT TAKE EVIDENCE FROM NOTES OF ARBITRATORS — SOMETIMES SITS WITH ARBITRATORS —IF SO, MUST NOT INTERFERE WITH THEM.

I HAVE now dealt fully with the duties and powers of the single arbitrator, and propose next to consider the points specially affecting the offices of joint arbitrators, and of *umpire*, i. e. a person appointed to decide between two arbitrators, it being a common practice for the submission to provide that the plaintiff and defendant shall each appoint an arbitrator. Formerly, by the Common Law Procedure Act it was provided that,

> "When the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make award, unless they be called upon by notice as aforesaid (i. e. *by a notice in writing from any party*) to make the appointment sooner."

The appointment of an umpire, when in writing, will be invalid unless signed by both arbitrators together.

Now in England and Wales, under the Arbitration Act, 1889, clause 5, sub-sections *c* and *d*, it is provided as follows:—

> (*c.*) "Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:
>
> (*d.*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:
>
> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.
>
> If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

Where there are three or more arbitrators, and no clause empowering a majority of them to give a binding decision, each must act as if he were sole arbitrator; for the office being joint, if one omit to act, any decision by the remainder is invalid.

All remarks made in the last chapter as to illegality of a single arbitrator surrendering his opinion to that of another person, apply with equal force to joint arbitrators and to umpires, who must not allow themselves to give an opinion, or agree to any particular decisions, simply because it is that of their colleagues; nor must they agree beforehand to be bound by the decision of any one particular person. Nevertheless, I need hardly point out that it is the duty of all so situated to hold their minds open to honest conviction, whether by argument or otherwise, and that nothing is to be more avoided by all persons holding judicial or semi-judicial functions, than stubbornness.

It is especially worthy of note that nothing done by joint arbitrators will hold good, unless done by all in concert. Thus, every arbitrator must be present at every meeting, to render the proceedings valid.

It has been before mentioned that, where the submission requires the appointment of a third person by the joint arbitrators before they proceed with the reference, all proceedings taken before such appointment is made are invalid.

Even where an award made by two out of three arbitrators is to hold good, the third must be appointed before any steps are taken, so that the parties may have the benefit of the judgment of all three. The two first appointed must not look upon the third merely as an umpire, to be appointed and called in in case of difference between them. But it may, of course, be that the intention of the submission is for the third arbitrator to be called in to decide, in the event of the first two not agreeing in an award, and it is then that he will properly be styled an "umpire."

The umpire is sometimes named in the submission, but it is more usual to leave his appointment to the arbitrators; and they must remember that the umpire is to act as between the parties, and not between themselves. Thus, they must not require the umpire's decision on one point of disagreement; but if they cannot agree on all points, they must refer it to the umpire to decide on all points, unless they are especially empowered by the terms of the submission to act otherwise.

In the Lands Clauses Consolidation Act, 1845; the Railways Clauses Consolidation Act, 1845; the Railway Companies Arbitration Act, 1859, and the Companies Clauses Consolidation Act, 1845, the provisions are nearly identical, and are to the effect that, where more than one arbitrator has been appointed, they shall, before entering

upon the reference, appoint, in writing, an umpire, to decide on any matters on which they shall differ.

Under the Metropolitan Buildings Act, 1855, a similar provision occurs, but those appointed to act are not called arbitrators and umpire, but surveyors, the umpire being called the third surveyor.

An umpire's limit of time for the making of his award will commence from the disagreement of the arbitrators, except where a time is named by which their award should be made, in which case his authority will commence from that date. It cannot commence before, as up to that time it is open to them to agree. If a time be named in the submission for the making of an award by the umpire, it must, of course, be made by that time, unless the limit be enlarged by the Court or a judge. By the Lands Clauses Consolidation Act it is provided that if the arbitrators or their umpire shall for three months have failed to make an award, the question is to be settled by a jury; and though it is not clear from what date the three months ought to be computed, decisions in the Courts appear to show that the umpire is to have three months to himself from the expiration of twenty-one days after the appointment of the last of the arbitrators (the time allotted by the statute for the making of an award by the arbitrators), or from the expiration of such enlargement of their limit as the arbitrators may legally make.

With regard to the Metropolitan Buildings Act, the following is the method of procedure. The building owner first serves a notice setting forth the works he proposes and nominating a surveyor, and unless the adjoining owner agrees in writing, he is presumed to dissent, and must within fourteen days appoint his surveyor (see section 85, clause 6). These two surveyors, before entering into any discussion of the matter, must appoint a third surveyor (see section 85, clause 7).

An umpire's duties so closely resemble those of an arbitrator that it will be needless to recapitulate them, nearly all that has previously been said as referring to arbitrators applying equally to the umpire. He must not, unless by special arrangement, take the evidence from the arbitrators' notes, but must hear the case for himself. It is, therefore, sometimes arranged, in order to save the expense of two separate investigations, that the umpire shall sit with the arbitrators. In this case he must be careful not to interfere in any way with the arbitrators in trying to agree. An umpire's decision must be in no way affected by the opinions of the arbitrators. Thus, unless the terms of the submission specially permit such a course, where the arbitrators agree on certain points and refer others to the umpire, he must not limit his award to these, but must award on all the points, even though he differ from the arbitrators on those matters on which they are agreed.

CHAPTER VII.

OF EVIDENCE — MATTERS MAY BE ADMITTED "BY ARRANGEMENT" — PROOF MUST BE AS STRICT AS IN COURTS OF LAW — DANGERS OF IRREGULARITY—SURVEYORS *v.* LAWYERS AS ARBITRATORS—EVIDENCE ON OATH — ACT REFERRING TO SAME — FORM OF OATH — ARBITRATOR'S DISCRETION AS TO QUANTITY OF EVIDENCE—WITNESSES MUST BE DISTINCTLY TENDERED — EVIDENCE MUST BE HEARD—EFFECT OF HEARING ONE SIDE ONLY — LORD ELDON'S OPINION — SKILLED ARBITRATOR MAY DISPENSE WITH CERTAIN EVIDENCE—VIEW OF PREMISES OPTIONAL WITH ARBITRATOR UNLESS EXPRESSED—ARBITRATOR MUST NOT REQUIRE CERTAIN EVIDENCE, AND THEN MAKE AWARD WITHOUT HEARING IT — ARBITRATOR MUST NOT AWARD WITHOUT HEARING EVIDENCE — "SECONDARY" EVIDENCE — "HEARSAY" — COPIES OF LETTERS—REPLIES TO LETTERS—POSTMARKS AS EVIDENCE OF TIME OF POSTING—HANDWRITING PROVED BY COMPARISON—BY WITNESSES — PLANS PROVED FROM ACTUAL SURVEY — FIGURING AND SCALES — DANGERS FROM INACCURACY — DEEDS: HOW TO PROVE — WILLS— WARRANTS OF ATTORNEY — STAMPING — COUNTERPARTS — VERBAL EVIDENCE OF CONTENTS OF DOCUMENT — ENTRIES IN BOOKS: HOW PROVED — MAY NOT BE USED BY PARTY, BUT BY OPPONENT — RECEIPTS — EVIDENCE BY ATTORNEY AS TO COMMUNICATIONS WITH CLIENT — EVIDENCE BY ARBITRATOR — SURVEYOR MAY REFER TO MEMORANDA—DISBELIEVER IN ETERNITY — TABLE V., RULES AS TO EVIDENCE—"LEADING" QUESTIONS — DIRECT EVIDENCE — EXAMINATION — CROSS-EXAMINATION — RE-EXAMINATION — PROTECTION OF WITNESSES — IRRELEVANT QUESTIONS — BEST MODE OF CHECKING COUNSEL.

THE claimant or plaintiff having opened his case, it is his duty to prove it as strictly before the arbitrator or umpire as if it were being heard in a court of law. Of course "by arrangement," many matters which would have to be strictly proved in Court may be either admitted without proof, or on very slight, and often irregular, evidence; but it is better for our purpose to assume that the matter is one where the parties are most hostile, and will "admit" nothing. It will then soon be

found that the popular idea that strict evidence is not required in an arbitration must be discarded; that the arbitrator is really bound by the same rules as a judge, and that his award will be set aside for (in some cases) the improper rejection of evidence tendered by either party; for receiving affidavits instead of *vivâ voce* evidence when he is directed to examine the witnesses on oath, and for other irregularities. It is especially with regard to this question of dealing with evidence that lawyers make the assertion before referred to, that we laymen are not so well qualified to undertake the duties of an arbitrator as themselves, whose daily pursuit of their profession brings them into contact with witnesses, and enables them to be much better judges, both of what is legally evidence and of the effect of it when given. But it is not in every case that the issues raised *are* questions of evidence; on the contrary, in most cases (at any rate, under the Acts of Parliament I have referred to) the question is a practical or scientific one, and *not* a legal one; and I think even lawyers would agree that, just as in many cases they may be the better able to sift evidence, or legally construe documents, we must be the better judges of damage done to lands or houses, the cost and nature of dilapidations, the value of property taken by railways, the proper compensation for rights of common, the best mode of setting out roads, the defining of boundaries, and, indeed, nine-tenths of the matters which Parliament has considered should be settled by arbitration. Nevertheless, the question of evidence is one of immense importance in the conduct of arbitrations, and to its consideration I propose that we should now turn.

The order of reference requires that evidence shall be given on oath (as is generally the case), the arbitrator cannot receive it otherwise, except by consent of the parties. It should, however, be noted that if no objection be taken at the time of examination, the party so

not objecting will be held to have assented to the omission of the oath. If no mention of the point be made in the order of reference, an arbitrator may, if he pleases, under 15 & 16 Vict., c. 99, insist on adminstering an oath. If by the order it is left to the arbitrator's discretion whether he will examine the witnesses on oath, he may exercise his option even though one of the parties require them to be sworn. No particular form of words is necessary to make an oath good in law. The usual form is as follows:

> "You swear that the evidence which you shall give before me touching the matters in question in this reference shall be the truth, the whole truth, and nothing but the truth. So help you God."

An arbitrator may exercise a certain discretion as to the quantity of evidence he will hear; but the greatest caution is necessary on this point, as an award may be set aside for a refusal to receive proof where the same was necessary. A witness must, however, be *distinctly tendered* to the arbitrator for examination, and the nature of the evidence stated to entitle the party calling him to impeach the award on the score of his non-acceptance.

An award made in an action for the non-repair of property, without the parties being heard, will not hold; as, though the property itself might be sufficient evidence to the arbitrator as to the non-performance of covenants, a hearing might disclose facts of importance to the issue.

A refusal, whether wilful or accidental, to hear one side, will invalidate any award. On this point I cannot refrain from quoting the noble words of Lord Eldon, who said, "By the great principles of eternal justice, which is prior to all acts of sederunt, regulations and proceedings of Court, it is impossible that an award can stand when the arbitrator hears one party and refuses to hear the other."

An arbitrator of special skill and knowledge in the matters in dispute may, however, refuse to hear certain evidence, or receive statements, if he feels that, from his own knowledge, such evidence or statements could have no effect upon his decision.

In the absence of any express direction in the submission, it is optional with the arbitrator whether he will comply with the request of one of the parties to view premises.

An award will be set aside if the arbitrator promises to hear witnesses or requires certain books to be looked into, and then makes his award without hearing the witnesses, or waiting for the information, or giving notice that he has found it unnecessary to do so.

An arbitrator cannot now make an award without hearing evidence (formerly this was not so); and one most important rule to be remembered is, that the best evidence must be given that can be obtained, and that until that is exhausted, what is called "secondary evidence" must not be given. This rule excludes "hearsay" evidence; that is, a witness stating what he has *heard* that A. did or said; and nothing that a third party did or said is evidence against the parties to the reference, unless it was said in their presence or done with their knowledge.

Again, a copy of a letter or other document cannot be read until it has been proved that the original has been lost or destroyed (a copy of a letter being an instance of the secondary evidence above alluded to); but if proper steps have been taken to procure the production of the original, a copy may sometimes be used. Further, a *reply* to a letter is not evidence until the letter in reply to which it was written has been proved.

The postmark on the envelope of a letter has been held not to be conclusive proof of the time of posting.

Handwriting may be proved by comparison, that is, comparing the handwriting of one document, admitted to be written by A., with one not so admitted; but this is a most unsatisfactory mode of proof, and, if possible, some person should be called as a witness who is acquainted with the handwriting to be proved.

Plans must be proved by the person making them, and should be made from actual survey. They should either have the dimensions figured on them, or a scale attached; and I need hardly say that it is of the most vital importance that such figures or scale should be very accurate. I was concerned in a case not long since where, owing to a certain drawing (prepared by a well-known architect) not scaling in accordance with the admitted facts, the judge ordered an adjournment of the case for accurate plans to be prepared.

Deeds thirty years old need no proof of their execution if they apparently come from a proper custodian of them; and those of less antiquity may now be proved by a witness who is acquainted with the signatures. (Formerly it was necessary, if possible, to produce the person who saw the deed executed.) This, however, does not apply to wills and warrants of attorney. A deed must not, of course, be admitted as evidence unless it be properly stamped; so that it is necessary for an arbitrator to have some knowledge of the Stamp laws. If, however, the opposite party take no objection to the deed on this score, the arbitrator is not bound to do so; but he must uphold a properly-taken objection when made.

If a deed be executed under a power of attorney, the power must be produced.

As a general rule, the counterpart of a lease cannot be given in evidence unless notice has been served to produce the lease itself.

Parole evidence can only be given in explanation of a written document where there is some latent ambiguity in the document which is unintelligible without such expla-

nation. Verbal evidence cannot be given of the contents of a written document which is not produced nor its absence accounted for.

Entries in books kept by a party cannot be used by him to prove his case, but his adversary may use them against him. The reason for this, of course, is, that there is nothing to prevent a man making in his books any entries he may think convenient to assist him—for instance, the payment of moneys not actually paid; but it is not likely he would falsify the entries in a manner which he thinks likely to operate against himself. Further, the entries being made without the knowledge of the other party, there are the same reasons for not allowing them to be used as for rejecting "hearsay" evidence. In a case where an arbitrator refused to compel the plaintiff to allow the defendant to inspect his (plaintiff's) books, the Court ordered that his authority should be revoked unless he did so. No books, ledgers, or vouchers of any kind can be tendered as evidence to show income or expenditure, or for any purpose, even by the principal of a firm, unless they are in his handwriting; but the bookkeeper, or other person making the particular entries, must attend to prove them, and he may be examined upon his method of entering them, and the materials whence he was enabled to do so. Further, he may, of course, be questioned as to their *bona fides*.

A receipt is not *conclusive* evidence.

Attorneys, counsel, and their clerks, are privileged from giving evidence as to communications made by their clients; and an attorney will be prevented from disclosing his client's secrets, even after he (the attorney) has been struck off the rolls.

An arbitrator cannot be compelled to give evidence as to matters that occurred before him during a reference, but may be called to prove what matters were *claimed* before him.

It is held that a surveyor is entitled to refer, to refresh

his memory, to a copy of his report, if proved to have been made from his original notes. Thus, a surveyor must not refer to a specification of dilapidations written out from memory, but only if it were actually taken on the premises at time of survey.

The following Table will be found to contain the essence of the foregoing remarks :—

TABLE V.

Rules as to Evidence.

"Secondary" evidence not admissible, if better can be given.

"Hearsay" evidence not admissible.

Copies not evidence till satisfactory reason be given for non-production of originals.

Reply to letter not evidence till letter proved.

Postmark not conclusive evidence of time of posting.

Handwriting may be proved by comparison.

(Preferable, however, to prove by witness acquainted with the handwriting.)

Plans must be proved by the person making them, and must be figured, or have scale attached.

Deeds thirty years old require no proof.

Deeds of less antiquity to be proved by persons acquainted with signatures (except wills and warrants of attorney).

Deeds not admissible unless properly stamped.

If deeds executed under power of attorney, same to be produced.

Counterpart lease inadmissible unless notice given to produce lease.

Parole explanation of document only admissible when same is unintelligible without.

Verbal evidence of absent document only admissible when non-production accounted for.

Entries in party's books not evidence for him, but may be used against him.

Must be proved by party actually making them.

Receipt not conclusive evidence.

Attorneys, counsel, and their clerks not witnesses as to communications with their clients.

Arbitrator compelled to give evidence only as to matters claimed before him.

Witness may refer to report made from original notes of survey.

A difficulty that frequently arises is as to the form of question to be put to a witness, it being a rule that a party calling a witness must not ask him what are termed "leading" questions, i. e. questions which indicate the answer that is required; nor (unless the witness is "hostile") can the party calling him examine him except upon such matters as are direct evidence upon the issues; nor ask him questions tending to contradict the evidence he has given. On the other hand, the adverse party can cross-examine a witness upon almost any subject, and for almost any length of time (as we have seen in the "great interminable" Tichborne case), and can also examine him, and then call other evidence to prove that his testimony is untrue. In *re-examination* a witness can only be questioned on matters touched upon in his cross-examination.

The arbitrator will find that one of his greatest difficulties is as to the extent to which witnesses are entitled to his protection. It, of course, will constantly be the cue of a counsel or solicitor, in cross-examining a witness, to confuse or "bother" him—a practice which, even in our Superior Courts, is often carried to a lamentable extent. While fairly done, however, it would be injudicious for an arbitrator to interfere; but there are times when his interposition, even unsought by the witness, becomes imperative. Sometimes a question will be asked (for the simple purpose of irritating a witness, and thus throwing him off his guard) which is quite irrelevant to the issue. In such cases the best course is, perhaps, quietly to ask the cross-examining counsel or solicitor whether he has any ulterior object in asking the question, as you cannot quite see how it affects the issue, and this will generally have the desired effect.

CHAPTER VIII.

OF THE AWARD—MUST BE GOVERNED BY SUBMISSION—VERBAL AWARDS — AWARD USUALLY IN WRITING AND STAMPED — PROVISIONS AS TO AWARDS UNDER LANDS AND RAILWAYS CLAUSES CONSOLIDATION ACTS, AND RAILWAY COMPANIES ARBITRATION ACT—WHEN AWARD TO BE PUBLISHED BY A CERTAIN DAY — HOW PUBLICATION MADE — WHEN MORE THAN ONE ARBITRATOR—APPLICATION TO SET ASIDE AWARD—WHEN AWARD TO BE DELIVERED BY STATED TIME—LANDS CLAUSES CONSOLIDATION ACT AS TO DELIVERY OF AWARD — STAMPING OF AWARDS—WHAT AWARDS EXEMPT—NO PARTICULAR FORM NECESSARY FOR AWARDS — MUST CONVEY DECISION — RECITAL OF SUBMISSION—OF ENLARGEMENT — OF VIEW — IRREGULARITIES WHICH WILL NOT INVALIDATE AWARD — AWARD BY CERTIFICATE — AWARD MUST NOT BE MADE IN PARTS—EXCEPTION—AWARD MUST DECIDE ALL MATTERS SUBMITTED — MUST GIVE DIRECTIONS FOR CARRYING DECISION INTO EFFECT — MUST DECIDE THE PRECISE QUESTION SUBMITTED — MUST NOT LEAVE THE RESULT CONDITIONAL — MAY IMPOSE ALTERNATIVE —MUST BE CERTAIN IN ITS TERMS—AWARD WHEN BAD IN PART—AWARD DEALING WITH MATTERS NOT SUBMITTED—EMPLOYMENT ON AWARD OF ATTORNEY TO PARTY—TABLE VI., MATTERS WHICH WILL INVALIDATE AN AWARD—ARBITRATOR'S AUTHORITY ENDED BY MAKING OF AWARD — MAY NOT CORRECT EVEN SLIGHT ERROR IN AWARD — WHEN AWARD SET ASIDE—"REFERRING BACK" AN AWARD—DUTIES OF ARBITRATOR WHEN AWARD REFERRED BACK—LIMIT OF TIME WHEN AWARD REFERRED BACK — ENFORCEMENT OF AWARD — SUGGESTIONS —COLLATERAL SECURITY FOR PERFORMANCE OF AWARD—CONVEYANCE OF PROPERTY IN DISPUTE TO ARBITRATOR.

THE arbitrator or umpire in making his award, must consider, first of all, and comply with, any express directions given on that head in the submission, as departure from special directions on such points as whether the award is to be in writing, or under seal, or under hand only, will be fatal to its validity. A verbal award is not invalid, unless it be specified by the submission to be in writing; but it is almost unnecessary to point out the desirability of a decision of such a character being *written*. It is usual for the award to be a written docu-

ment, signed by the arbitrator in the presence of an attesting witness. This must be stamped, and is handed to the party who "takes up" the award. Unstamped copies are generally supplied by the arbitrator to the other party or parties to the reference.

Under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, the award must be in writing. These Acts further provide that the declaration which the arbitrator has to make before entering on the reference, is to be annexed to the award. Under the Railway Companies Arbitration Act, 1859, the award must be not only in writing, but under the hand of the person making it. All three Acts contain the important enactment that no award made under their provisions shall be set aside for irregularity or error in matter of form.

The submission usually provides that the award is to be published ready to be delivered by a certain day. It will not be invalid, though not delivered on the appointed day, if ready to be so. The publication of an award is generally made by the arbitrator notifying to the parties in writing, that his award is made and ready to be delivered on application and payment of charges. If there be more than one arbitrator, the award cannot of course be published till all (or the number required by the submission) have signed; and it has been before mentioned that in such a case all should sign together and in presence of one another. In cases where a time is stated, within which any application to set aside an award must be made, that time will commence from the date of publication of the award to the parties.

The submission may direct that the award shall be *delivered to the parties* by a certain day, and if so the direction must be followed, and it will not suffice that the award be ready to be delivered on that day and the parties notified of the fact.

Under the Lands Clauses Consolidation Act it is provided that the arbitrators shall deliver their award in writing to the promoters of the undertaking, who are to retain the same, and, at their own expense, furnish a copy to the other party on demand; and shall on demand produce the original for inspection.

There are certain exceptions to the rule requiring awards to be stamped. Awards in arbitration for settlement of disputes between masters and workmen are exempt, and it is probable that awards in references by assignees of a bankrupt would be free also. An award may be stamped at any time after execution on payment of the penalty, and free of penalty if taken to the office within six or eight weeks after execution.

No particular form of words is necessary to constitute an award, but an arbitrator cannot be too careful and precise in the language he employs. And, above all, he must take care that his words convey a *decision*. Where an arbitrator wrote, "I *propose* that a sum of 100*l.* should be paid to the plaintiff by the defendant," this was held not to constitute an award. An arbitrator, in drawing up his award, should recite so much of the submission as gives him his authority and sets forth the matter in dispute, and also any clauses conveying special powers or directions. He will also do well to mention the fact of any enlargement of time, and of his having viewed premises, where he was required by the submission to do so. The omission to mention or recite such points will not however affect the validity of the award.

Such errors as the following will not invalidate an award:—An erroneous recital of the submission, or of a portion thereof. A mistake in the Christian names of the parties appointing the arbitrator or umpire. A statement that the umpire was appointed by the parties, when the appointment was by the arbitrators. A misstatement as

to the date of the submission, or of an enlargement of time. A recital that the submission was by judge's order when same was by order of Nisi Prius.

In order to save the expense of the stamp, an arbitrator is sometimes directed, instead of making a formal award, to express his decision in a certificate, stating for whom, and for what amount, a verdict should be entered. This requires no stamp.

An arbitrator must not, unless specially empowered by the submission, make his award in parts, or at different times; but must deal with the whole of the matters submitted to him in one award. There is, however, an exception to this rule under the Railway Companies Arbitration Act, 1859, by which the arbitrators may, if they think fit, make several awards each on part of the matters referred.

An arbitrator must be careful to make his award a final decision on all matters submitted. His award will be bad if he determine all matters except one, and gives leave to one party to prosecute that matter.

Where an arbitrator had to decide on alleged defects in a building, on the builder's claim for extra works, and deductions for omissions, and to ascertain what balance was due to the builder, an award which ordered a gross sum to be paid to the builder in satisfaction of all matters in difference was held invalid, as it did not decide as to the alleged defects, and left it in doubt as to whether the sum awarded was as payment for the extra work.

An arbitrator must not only decide the questions submitted to him, but must give the necessary directions for such acts as are necessary to carry his award into effect. Thus, where an arbitrator had to allot certain lands among several tenants in common, who wish to make partition of their property, his award was held invalid

because he did not direct deeds of conveyance to be executed, to vest the allotments in the respective owners.

An arbitrator must decide the question submitted to him, and must not, instead of doing so, direct what appears to him an equitable arrangement, apart from the question submitted. Thus, where on the sale of some land a question arose as to the sufficiency of the vendor's title, and the arbitrator decided that the purchaser should accept the title with all faults, receiving an indemnity, the award was held to be invalid, as it did not decide whether the title was good or bad.

An award should not leave the result conditional on the voluntary performance by one party of certain acts, but an award may impose an alternative course. Thus, where the question related to a right of way, an award of a certain sum if the right were allowed to remain, or of so much less of it were taken away, was held to be valid. Again, an award may direct a certain sum to be paid on a certain day, or a larger sum on some day more distant, and so on, thus imposing a kind of cumulative penalty.

Another reason for the greatest care and clearness in drawing up an award, is that it will be set aside if there be any uncertainty as to its meaning, and the arbitrator must therefore be careful so to word his award that no doubt can possibly arise as to time, place, or person. Thus an arbitrator should not only state the sum he considers due from one party to another, but should direct payment of that sum. If he do not, non-payment is not disobedience to the award, and cannot be compelled. It is probable, however, that Chancery would enforce payment, and, at any rate, it would be open to the aggrieved party to bring his action. It is optional with an arbitrator, in the absence of any express direction, to fix a time and place for payment; and if he do so, the fact of the [illegible]named falling on a Sunday forms no objection to the

award. In dealing with property, also, an arbitrator must remember that he must distinctly specify in what manner, and by what documents or instruments, a conveyance or lease is to be made, and must provide for the execution of them, and also state at whose expense they are to be prepared.

According to the old law, an award which was bad in part was void altogether. This, however, is not the case at the present time, provided the bad part is clearly separable from the rest of the award; in which case the award will be void only as regards that part, and will hold good as to the remainder. Thus, supposing an arbitrator directs certain things to be done which are beyond his authority to order, his award will be invalid as to those directions, but, if there be no other fault, will stand on all other points. Or if he, being called upon to decide merely what sum is due from A. to B. for dilapidations, deal also with the question of the costs of the reference, and state in his award by whom they are to be paid, his directions as to the costs will have no value, while his award as to the amount of compensation will be binding. Where, however, from the construction of the award, the good and bad parts are inseparable, the presence of a defect must be, *ex naturâ rei*, fatal to the whole.

For an arbitrator to employ, to assist him in making his award, an attorney who has acted for one of the parties, is highly improper, but not, *per se*, a ground upon which the award would be set aside.

The following Table will, I think, be found useful:

TABLE VI.

Matters which will invalidate an Award.

Arbitrator having secret interest.
Arbitrator displaying strong bias.
Arbitrator taking money from one party before award made.
Arbitrator buying up claims of a party.

I do not propose going into the various methods of enforcing an award, because this belongs of right to our legal friends, but may point out two modes of ensuring compliance with the arbitrator's decrees, which may be useful. One is by the parties consenting to a warrant of attorney to confess judgment for a specific sum, as collateral security for the performance of the award. The warrant contains a declaration that no execution shall issue until non-performance of the award, therefore there can be no objection to the form. The other suggestion applies only where property is in dispute, and it is to convey all the property to the arbitrator, who can then reconvey it to the parties in accordance with his award.

CHAPTER IX.

OF COSTS AND CHARGES—ARBITRATOR CANNOT SUE FOR REMUNERATION —USUAL METHOD OF SATISFYING ARBITRATOR'S CLAIM—ARBITRATOR'S POWER TO DETAIN DOCUMENTS UNTIL PAID—COSTS OF DRAWING UP AWARD BY ATTORNEY—REMEDY IF ARBITRATOR'S DEMAND EXORBITANT—WHEN COSTS OF AWARD SHOULD BE NAMED THEREIN—WHEN COSTS "ABIDE THE EVENT"—EFFECT OF ARBITRATOR IMPROPERLY DEALING WITH QUESTION OF COSTS—WHEN COSTS "IN DISCRETION OF ARBITRATOR WHO SHALL ASCERTAIN THE SAME"—FEES OF ARBITRATORS PART OF COSTS OF UMPIRAGE—COSTS OF THREE KINDS: OF THE CAUSE, OF THE REFERENCE, OF THE AWARD — DEFINITIONS — TAXING COSTS—PROVISIONS AS TO COSTS UNDER LANDS CLAUSES CONSOLIDATION ACT—UNDER RAILWAYS CLAUSES CONSOLIDATION ACT—UNDER COMPANIES CLAUSES CONSOLIDATION ACT.

COMING now to the important questions of costs and charges, the first point to note is that the duties of an arbitrator are not such as to entitle him to sue for his remuneration, unless in the event of his holding an express promise to pay. Even a clause in the submission that the costs of the reference and award, *including a reasonable compensation to the arbitrator, are to be in his discretion*, will not entitle him to sue on the submission, as he is not a party to it. The proper and usual course, and that now sanctioned by the Courts, therefore, is for the arbitrator, when giving notice to the parties that his award is ready for delivery, to notify them of the amount which he considers a proper remuneration for his services, so that the party who takes up the award may be prepared to pay that sum. If the party so paying be not the one upon whom the costs are thrown by the award, he may recover from his opponent, by attachment, if necessary, such costs as he (the opponent) is liable to bear.

The arbitrator may refuse to give up, until his charges are paid, the award and submission, and any memoranda or valuations obtained by him for his guidance from other persons; but he must not detain documents put in before him as evidence. A lay arbitrator may charge, as part of the costs of his award, payments made to an attorney or barrister for drawing up the award. In cases where the arbitrator's own charges are very high, however, such payments would probably be disallowed by the Court. It would appear there is nothing to prevent an arbitrator refusing to give up his award except on payment of an exorbitant fee, but the party paying it has his remedy by action against the arbitrator for money had and received. The amount of the arbitrator's charges should not be named in the award, but in the letter of notification that the award is ready to be delivered. In cases, however, where the arbitrator is specially directed by the submission to ascertain the amount of the costs of the award, they should be stated therein. The power of the arbitrator over the costs of the reference and of the award will be regulated by the terms of the submission.

When the submission provides that the costs *shall abide the event*, the arbitrator has no control over them, and should make no mention of them in his award. His doing so will not, however, invalidate the *whole* of his award (as some surveyors have, within my knowledge, endeavoured to maintain), but the award will be void as regards the costs. Where the submission states that the costs are to be in the discretion of the arbitrator, "who shall ascertain the same," he must award costs, stating the amount, or his award will be endangered on the ground of omission to decide on *all* matters submitted.

When arbitrators have disagreed and an award is made by the umpire, he should charge the fees due to the arbitrators as part of the costs of the umpirage.

It must be noted that costs are of three kinds—of the *cause*, of the *reference*, and of the *award;* and it will depend upon the terms of the submission to what extent the arbitrator is able to direct by whom, and in what manner, they shall respectively be borne; as he may be empowered to adjudicate upon the costs of the reference and award, but not those of the cause, and so forth.

Costs in the cause, of course, only exist where the reference arises out of an action at law, and comprise all expenses incurred up to the time of the submission, of the order of reference, of making same a rule of Court, and also of any proceedings in the cause *after* the award, if any such should be taken. Costs in the reference include all expenses incurred in the inquiry before the arbitrator, whether as to matters in the cause or out of it. Costs of the award are the arbitrator's charges which, as has been said, should be paid to him when the award is taken up. Thus, if the submission to reference of a cause, and all matters in difference, contain a clause giving the arbitrator power over costs, he may make one party pay, not merely the costs of the award and of the reference, but also of the action or suit which led to it. And, in dealing with the costs of the reference, he has power to state was costs shall be allowed to each witness, and to decide the costs of the briefs. These costs, if disputed, will have to be taxed in the same manner as if the matter had been tried in Court. Therefore, where an arbitrator does not wish to give either party an advantage over the other in the matter of costs, it is better to award that each shall pay his own costs of the reference and half that of the award, rather than each shall pay half the costs of the reference and award, as thereby is saved the necessity of examining and contesting the costs incurred by each party in the reference, and those of the award.

It may be useful to note the provisions as to costs in certain Acts under which arbitrations largely arise.

Under the Lands Clauses Consolidation Act, 1845, i references of disputes as to compensation for lands take "all the costs of any such arbitration, and incide thereto, to be settled by the arbitrators, should be bor by the promoters of the undertaking, unless the arbitr tors shall award the same or a less sum than shall have bee offered by the promoters, in which case each party sha bear his own costs incident to the arbitration, and th costs of the arbitrators shall be borne by the parties i equal proportions." The costs of the reference and awa are to be taxed by the Master, if either party require it.

The Railways Clauses Consolidation Act, 1845, enac that, except in cases where by that or any special Act is otherwise provided, the costs shall be in the discretic of the arbitrators.

The Companies Clauses Consolidation Act, 1845, has similar provision, with the addition of the words, "or the umpire, as the case may be."

CHAPTER X.

ADVICE TO PLAINTIFFS AND DEFENDANTS—GETTING UP CASE—ADVANTAGES OF ARBITRATION OVER TRIALS IN COURT—"SUPPLEMENTARY" AND "REBUTTING" EVIDENCE — SURPRISES — DISADVANTAGES OF ARBITRATIONS—ARBITRATOR AN UNCERTAIN JUDGE—MORE READY TO ADMIT IMPERFECT EVIDENCE THAN TO REFUSE GOOD—POSSIBLE DISCOURTESY—VALUE OF PLANS—EFFECT OF NUMEROUS WITNESSES —CASE FOR THE DEFENCE—ADVANTAGE OF HEARING PLAINTIFF'S CASE—VALUE OF "PLEADINGS" IN LAW SUIT—CONCLUSION—REVIEW OF CONTENTS.

I PROPOSE concluding these papers with a few remarks from the point of view of those engaged in the reference for the plaintiff or the defendant, as the case may be.

The great advantage, to those engaged in getting up a case, which arbitrations possess over trials in Court, is that there are more opportunities given to produce what may be called "supplementary," and sometimes "rebutting," evidence. In Court, everything must be ready to be laid before the judge and jury on the one occasion of trial, and if the best and strongest evidence be not then produced, there will be no opportunity for its production afterwards. In arbitrations this is not so. If your opponent at one hearing astonish you by the production of unexpected, or unexpectedly strong, evidence, you will have time before the next meeting to prepare yourself with equally strong evidence (if procurable) to counteract the first. There is, therefore, not the same probability of your case being overthrown by a "surprise," a catastrophe which by no means unfrequently occurs in cases tried in Court. This point has been dealt with at length in my previous book on 'Compensations.' On the other hand, there are of course certain disadvantages attending

the settlement of disputes by arbitration that do not apply to trials in Court; and especially will it be found that the arbitrator is an *uncertain* judge,—one day willing to admit anything; next day, perhaps, disposed to admit nothing, except on the most strictly legal, almost *extra* legal, proof. These remarks of course apply more to lay than to legal arbitrators, as, in the case of a barrister of standing, one would naturally expect, and would probably find, all the certainty and consistency characteristic of the occupants of that Bench which the arbitrator himself may be some day destined to adorn. But with inexperienced legal arbitrators, and with lay arbitrators, until such time as the increased practice in that office claimed for them in this volume renders them better qualified, it will be found that they are uncertain and inconsistent in their views as to evidence, and that they are now dictatorial, and anon weakly yielding. As a rule, perhaps, an arbitrator will be found more ready to admit what may be termed imperfect, or even bad, evidence, that to refuse that which is good; and, as has been pointed out, the powers of an arbitrator are really so imperial that, provided he does not actually commit any act for which his award may be set aside, he may behave with impunity in a most arbitrary manner; as, for instance, by insisting on the attendance of parties at meetings at times inconvenient to them. This, of course, is a line of conduct on the part of an arbitrator which is not often met with, as, to the credit of professional men of all denominations, it may be said that a man chosen to fill the responsible post of an arbitrator will almost invariably discharge his duties in a gentlemanly and courteous manner. It it my duty, however, to point out the possibilities.

In getting up your case for arbitration, it is wise to be quite as careful as if you were going before a jury. You may remember, however, if the reference is to a technical arbitrator, that *plans* will have comparatively little weight, as he will, in all probability, *view* the property,

which will influence his mind much more than any drawings you can put before him, though they probably might affect the opinions of an unskilled arbitrator, or a common or special jury — the latter, however *special*, having, strange to say, no *special* knowledge. In the same way, though *numbers* of witnesses may have an effect on the minds of a jury, they would have comparatively little on that of a technical arbitrator, who probably knows well the relative professional status of most of the witnesses called, as well as their peculiar views, and judges of their evidence accordingly. A few *good* men, judiciously selected, are better, in such a case, than a number of witnesses of little or no standing. You must, however, be to some extent guided by the tactics of your opponent, as it is hardly fair to your arbitrator to place him in the position of having to decide against the apparent weight of evidence. It will be wise, therefore, to ascertain, as far as possible, what evidence the other side intend to bring, and if they have many witnesses, to secure such a "team" as will relieve the arbitrator from the difficulty indicated.

If you are acting for the defendant, arbitration gives you the inestimable advantage that you may almost wait to hear what your opponent's case is before you prepare your own at all. This is, perhaps, scarcely handsome, and I do not advise it, especially as such a course would lead to difficulty, and perhaps disaster; if, for instance, the arbitrator appoint consecutive days for the hearing. Still, the advantage remains, and may fairly be used to the extent of enabling you to obtain further evidence which, perhaps, until you have heard the plaintiff's case, you would not have thought of. A disadvantage the defendant labours under in arbitration, which the *pleadings* to a great extent remove in a lawsuit, is that, until the proceedings actually commence, he has no means of knowing how the other side intend to shape their course; but, as has been above pointed out, the extra time for prepara-

tion of evidence given by arbitration is more than an equivalent for this drawback.

* * * *

I trust that I may now, without presumption, claim to have given my readers no inconsiderable insight into the practice of arbitrations, and the principles which should guide an arbitrator. I have shown them what may be referred, and who may refer, and also the methods in which cases for reference may arise, and have explained who may be an arbitrator, and discussed the qualifications which an aspirant to that office ,should possess, and have dealt fully with the questions of what an arbitrator may and may not do, not only as to enlargement of time, but on, I believe, *every point* in which he can be in doubt or difficulty. We have seen the various methods in which submission to arbitration may be made, and the way in which the necessary documents are affected by the Stamp laws; and have also given a usual form of submission, and explained at length what is meant by a reference on the "usual terms." The power of revocation by the parties has also been reviewed. Passing then to the reference itself, I have given many hints as to evidence which I think cannot fail to be valuable, and remarked upon the rules govering examination and cross-examination, and the administration of oaths. The arbitrator's powers and duties as to the admission and rejection of evidence, in allowing time, in closing the reference, in proceeding *ex parte* in amending the record, and taking skilled opinions, are fully dealt with. The offices of joint arbitrators and of umpire, as distinguished from that of single arbitrator, have then engaged our attention; and the method in which the award should be drawn up, and what defects will be sufficient to render it of no effect, and are therefore principally to be guarded against, are fully set forth. I have, lastly, dealt with the question of costs, both as regards the arbitrator's own personal charges and his [illegible] of adjudicating on the matter of costs as between

the parties; and with a few remarks on the system of arbitration as bearing on the position respectively of plaintiff and defendant, have brought to a close a volume which, I trust, while affording to the young practitioner, in a practical form, information not elsewhere to be met with, will not be without value and interest even to those of more advanced experience.

APPENDIX.

CONTENTS OF APPENDIX.

APPENDIX.

FORM I.

SUBMISSION BY AGREEMENT.

(See page 10.)

FORM II.

SUBMISSION BY BOND.

Know all men by these presents that I, A. B., of , am held and firmly bound to C. D., of , in the sum of £ of good and lawful money of Great Britain, to be paid to the said C. D., or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the day of , in the year of our Lord .

Whereas disputes and differences have arisen and are still subsisting between the said A. B. and C. D. as to (*here state the matter in dispute*), and it is agreed by and between the said A. B. and C. D. to refer the same to E. F., of , and G. H., of , with liberty to them to choose and appoint an umpire. Now the condition of this obligation is such, that if the above-bounden A. B., his heirs, executors, and administrators, do and shall, on his and their part and behalf, in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of the said arbitrators respecting the matters re-

ferred; so as the said arbitrators make and publish their award in writing of and concerning the same ready to be delivered to the parties, or if they or either of them shall be dead before the making of their award, to their respective personal representatives who shall require the same, on or before the day of , or on or before any other day not later than the day of , to which the said arbitrators shall by any writing signed by them, endorsed on these presents, enlarge the time for making their said award; and in case the said arbitrators shall not make an award of and concerning the premises within the time limited as aforesaid, then if the said A. B., his heirs, executors, and administrators, do and shall upon his and their part and behalf in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination of the person so by the said arbitrators to be chosen and appointed as umpire as aforesaid, so as the said umpire do make and publish his award or umpirage in writing (*continue as in Form of Submission, Clauses* 4, 5, *and* 6, *adapting them to the case of an umpire*), then this obligation to be void, otherwise to remain in full force: And the said A. B. and C. D. do hereby consent and agree that this submission shall be made a rule of the Court of Queen's Bench at the instance of either of the said parties, their executors, or administrators: And it is further agreed by and between the said A. B. and C. D. that (*here add such of the clauses and provisions given in the Form of the Submission as are applicable*).

Signed, sealed, and delivered in the presence of A. B. (L. S.)

(*C. D. should execute to A. B. a similar bond with a similar condition.*)

FORM III.

SUBMISSION BY DEED.

This Indenture, made between A. B., of , and C. D., of , of the first part; E. F., of , of the second part; and G. H., of , of the third part:

Whereas differences have arisen and are depending between the said A. B. and C. D. and the said E. F., and also between the said A. B. and the said E. F., and also between the said E. F. and the said G. H., touching and concerning (*here state the matters*); and in order to put an end to the said differences, the said parties have agreed to refer the same (*or* "all matters in difference") to the award of X. Y., of

Now this Indenture witnesses that they, the said A. B., C. D., E. F., and G. H., do and each of them doth, each for himself severally and respectively, and for his several and respective heirs, executors, and administrators, covenant and agree with each other, his heirs, executors, and administrators respectively, to stand to, abide by, observe, and perform the award and determination of the said X. Y. of and concerning the premises aforesaid; so as the above-mentioned arbitrator (*continue as in Form of Submission, Clauses* 4, 5, *and* 6): And the said parties do hereby further agree that (*add Clause* 8 *of Form of Submission, and any other clauses considered advisable*). In witness whereof the said parties hereto set their hands and seals, the day of , in the year of our Lord

	A. B. (L. S.)
Signed, sealed, and delivered	C. D. (L. S.)
by the said , in the	E. F. (L. S.)
presence of .	G. H. (L. S.)

FORM IV.

SUBMISSION BY JUDGE'S ORDER.

A. B. } Upon hearing the attorneys or agents on both
v. } sides, and by their consent, I order that this cause
C. D. } ("and all other matters in difference between the parties") be referred to the award, order, arbitrament, final end, and determination of X. Y., of ; so as he shall make and publish his award in writing of and concerning the premises ready to be delivered to the said parties, or to either of them; or if they or either of them shall be dead before the making of the said award, to their respective personal representatives who shall require the same; on or before the day of now next ensuing, or on or before any other day to which the said arbitrator shall by any writing under his hand, to be endorsed hereon, from time to time enlarge the time for making the said award: And, by the like consent, I further order that the death of either of the said parties shall not act as a revocation of the authority of the said arbitrator; and that the costs of this action and of such reference (save and except the charges of the arbitrator and for the award) shall abide the event of the award, and that the costs and charges of the arbitration and for the award shall be in the discretion of the arbitrator: And, by the like consent, I order that the said parties, if examined, together with their respective witnesses, shall be sworn or affirmed before the said arbitrator, and examined upon oath or affirmation; and that the said parties shall produce before the said arbitrator all books, deeds, papers, and writings, relating to the matters in difference between them, as the said arbitrator shall require: And I do likewise order, by and with the like consent, that the said parties shall on their respective parts in all things stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of

the said arbitrator to be made and published as aforesaid; and that neither of the said parties shall bring or prosecute any writ of error, or any action or suit at law or in equity, against the said arbitrator, or against each other respectively, concerning the matters referred by this order; and if either party shall, by affected delay or otherwise, wilfully prevent the said arbitrator from proceeding in the reference, or from making his award, he shall pay such costs as to the Court of Queen's Bench shall appear just and reasonable: And by the like consent, I do lastly order that this order shall and may be made a rule of the said Court, if the same Court shall so please. (*These are the common provisions in such an order, but they may be varied as the parties please. It may be advisable to add the clause for referring matters back. See Form of Submission, Clause* 16.)

Signature of the Judge.

Dated this day of 18

FORM V.

DEMAND FOR ARBITRATION WHERE LANDS TAKEN UNDER LANDS CLAUSES CONSOLIDATION ACT.

Whereas I, A. B., of , received notice in writing from the Railway Company (*or the promoters of the public undertaking, naming them by their proper title*), that they required for the purposes of their railway (*or other public work*) the lands and tenements specified in the said notice, comprising the lands and tenements specified in the under-written schedule, and that they were willing to treat for the purchase of the same, and that they intended to take the same, pursuant to the powers given them by certain Acts of Parliament: And whereas the said Company (*or the promoters*) have offered me the sum of £ , and no more, as the purchase-money and compensation for my interest in the

lands and tenements so intended to be taken, and for the damage that may be sustained by me by reason of the execution of the works connected with the said railway (*or other public work*): And whereas I am not satisfied with that amount, and do not agree to receive and accept the same as sufficient compensation, and a dispute has arisen between me and the said Railway Company (*or the promoters*) respecting the same (*if no sum have been offered by the promoters leave out the above paragraphs and say*: "And whereas a dispute has arisen between me and the said Railway Company (*or the promoters*) respecting the amount of purchase-money and compensation to be paid me for my interest in the said lands and tenements, and for the damage that will be sustained by me by reason of the execution of the works connected with the said railway," *or other undertaking*): And whereas the said Company (*or promoters*) have not yet issued their warrant to the Sheriff to summon a jury in respect of such lands: I hereby state that I am interested in the lands and tenements set out and described in the first division of the said schedule, as tenent in fee simple; and in the lands and tenements set out and described in the second division of the said schedule as tenant for years of the same, under a lease from H. K., of , for years from , 18 : And I claim in respect of such my interest in the said lands and tenements the sum of £ (*a sum exceeding fifty pounds*) as purchase-money and compensation; having regard not only to the value of the lands and tenements so intended to be taken, but also to the damage which I shall sustain by reason of the severing of the lands and tenements intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers of the Acts above referred to, or of any Acts incorporated therewith: And I hereby give notice to the said company (*or promoters*), that I desire to have the amount of such compensation settled

by arbitration, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845 (*): And I request the said Company (*or promoters*) to concur with me in the appointment of a single arbitrator; and failing such concurrence, to nominate and appoint an arbitrator on their part, to whom, together with an arbitrator to be appointed and nominated by me, the dispute respecting the amount of such compensation shall be referred. (*Instead of the concluding words of this Form, after the mark* (*) *there often follows an appointment of an arbitrator by the landowner. It may be in these words*): "And I do hereby appoint X. Y., of , to be the arbitrator on my part to settle and determine the amount of the purchase-money and compensation to be paid to me by the said Company (*or promoters*) in respect of my said interest in the aforesaid lands and tenements so intended to be taken, and I request the said Company (*or promoters*) to nominate and appoint an arbitrator on their part."

Dated the day of , A.D. .

A.B.

To the Railway Company (*or the promoters of, &c., as the case may be*).

SCHEDULE.

(*Here specifically describe the lands.*)

FORM VI.

DEMAND FOR ARBITRATION WHERE PREMISES INJURED.

Whereas I, A. B., am the owner in fee of a certain messuage and premises, called , with the appurtenances, for the residue yet unexpired of a term of years, from (*or otherwise describe the particular premises, and the interest of the party*), situate at , in the parish of , in the county of : And whereas my said lands and premises have been injuriously affected by the execution of the works of

the (*here state the name of the railway, or other public undertaking*), in the manner following, that is to say (*here state the nature of the injury*): And whereas I am entitled to compensation in respect of such injury: And whereas you, the (*railway company or promoters*) have not made me satisfaction for the same: I hereby give you notice that I claim the sum of £ (*a sum exceeding* £50), as compensation for the aforesaid injury; and that unless within twenty-one days after the receipt of this notice you pay the said amount or enter into a written agreement to pay the same, I desire to have the amount of such compensation settled by arbitration, (*) and request you to concur with me in the appointment of a single arbitrator, or to appoint an arbitrator on your part, to whom, together with an arbitrator to be appointed by me, the question as to such compensation shall be referred. (*If the party appoint an arbitrator at once, he may, instead of the concluding words after the* (*), *insert the appointment, as in the last Form.*)

Dated the day of , A.D. .

To the Railway Company (*or other promoters*).

FORM VII.

APPOINTMENT OF ARBITRATOR UNDER THE LANDS CLAUSES CONSOLIDATION ACT.

Whereas under the provision of the (*here name the Act of Parliment*), the Railway Company (*or other promoters*) are entitled to take, and have given due notice in writing to A. B., of , in the county of , that they require for the purpose of the railway (*or other undertaking*) part of certain land and tenements, situate in the parish of , in the county of , in which the said A. B. is interested as (*state the interest*): which said lands and tenements are specifi-

cally described in the said notice and also in the underwritten (*or* "annexed") schedule: And whereas the said Company (*or promoters*) have offered to the said A. B. the sum of £ , as compensation in respect of the said land and tenements: And whereas the said A. B. is not satisfied therewith, and has required that the amount of such compensation should be determined by arbitration: Now these presents witness that the said Railway Company (*or* "said A. B."), pursuant to the provisions of the said recited Acts, and of the Lands Clauses Consolidation Act, 1845, and of the other Acts incorporated with the said recited Acts, do hereby appoint C. D., of , to be an arbitrator to settle and determine the amount of purchase-money and compensation to be paid by the said Railway Company to the said A. B., in respect of his interest in the said land and tenements so intended to be taken as aforesaid, and for the damage that may be sustained by him by reason of the execution of the works of the said railway; regard being had by the said arbitrator not only to the value of the lands and tenements so intended to be taken, but also to the damage, if any, to be sustained by the said A. B. by reason of the severing of the land and tenements so intended to be taken from the other lands and tenements of the said A. B., or otherwise injuriously affecting such other lands and tenements by the exercise of the powers, if any, of the said Acts.

Dated this day of A.D. .

(*Signed by the Directors or Secretary of the Company, or undertaking.*)

(*Or, when the appointment is by the Landowner,*)

A. B.

SCHEDULE.

(*Here specifically describe the premises to be taken.*)

FORM VIII.

APPOINTMENT OF SINGLE ARBITRATOR TO ACT FOR BOTH PARTIES, COMPANY REFUSING TO APPOINT AN ARBITRATOR.

Whereas the Railway Company (*or other promotors, as the case may be*) lately gave me notice in writing that they required to take for the purposes of their railway (*or other undertaking, following the terms of the notice*) certain lands and tenements specified in the said notice, and in the underwritten schedule:

And whereas a dispute arose between me and the said Railway Company (*or the promotors*) respecting the amount of purchase-money and compensation to be paid to me by them for my interest as (*state the interest, as in the previous Forms*) in the said lands and tenements, and for the damage that might be sustained by me by reason of the execution of the works of the said railway (*or other undertaking*); having regard not only to the lands and tenements so intended to be taken, but also to the damage, if any, to be sustained by me by reason of the severing of the lands and tenements so intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers given them by the Lands Clauses Consolidation Act, 1845, or by their special Act, or by any Act incorporated therewith:

And whereas, before they issued their warrant to the Sheriff to summon a jury in respect of such lands and tenements, I served them with a notice in writing, signifying my desire to have the amount of such compensation settled by arbitration, and stated in such notice the interest in respect of which I claimed compensation, and the amount of compensation which I claimed, and requested them by such notice to appoint an arbitrator to determine such dispute, and stated in such notice the matter required be referred to arbitration: And whereas I appointed

X. Y., of to be an arbitrator to determine such dispute, and notified such appointment to the said Company (*or promotors*): And whereas the space of fourteen days has elapsed since the said dispute arose, and since the service of the aforesaid request in writing, and since the appointment by me of such arbitrator, and the notification thereof to the Company (*or promoters*); and the said Company (*or promotors*) have failed to appoint an arbitrator: I now hereby in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, and of the Acts above referred to, appoint the said X. Y. to act on behalf both of me and of the said Company, in hearing and determining the said dispute.

Dated the day of , A.D. .

A.B.

SCHEDULE.

(*Here specify the lands, as in the original appointment of the arbitrator.*)

FORM IX.

APPOINTMENT OF ARBITRATOR BY PARTY DISSATISFIED WITH COMPANY'S VALUATION.

Whereas the Railway Company (*or the promoters of other public undertaking*), in consequence of my absence from the kingdom (*or* "in consequence of my not having been found by them"), procured a valuation to be made under the Lands Clauses Consolidation Act, 1845, of the compensation to be paid in respect of my estimated interest in the lands and premises described in the underwritten schedule; and have deposited the amount of such valuation, being the sum of £ , in the Bank of England, pursuant to the provisions of the above statute: And whereas I am dissatisfied with such valuation, and have given the said Railway Company (*or*

promoters) due notice in writing, requiring that the question of such compensation shall be submitted to arbitration, and calling upon them to appoint an arbitrator: I hereby appoint X. Y., of , an arbitrator, to determine whether the said sum so deposited as aforesaid by the said Railway Company (*or other promoters*) was a sufficient sum; or whether any and what further sum ought to be paid or deposited by them.

Dated the day of , A.D. .

A. B.

FORM X.

APPOINTMENT OF AN UMPIRE BY ARBITRATORS.

Pursuant to the powers given to us by an agreement of reference, made on the day of , A.D. (*or*, "by the agreement of reference contained in the condition of two mutual bonds, made and executed on the day of , A.D. , by A. B., of , and C. D., of , respectively each to the other;" *or* "by an order of Nisi Prius, made on the day of , A.D. , in a cause in which A. B. was plaintiff, and C. D. defendant"), we the thereby-appointed arbitrators (*) do by these presents nominate and appoint X. Y., of , to be the umpire according to the provisions of the above-mentioned agreement of reference (*or* "bonds of submission," *or* "order of Nisi Prius"), provided he be willing to accept such office. As witness our hands this day of , A.D. .

E. F.
G. H.

Witness,

FORM XI.

APPOINTMENT OF THIRD ARBITRATOR.

(*Commence as in last Form, from* *) do by this memorandum in writing under our hands, made before we have entered upon the consideration of the matters referred, nominate and appoint X. Y., of , to be the third arbitrator to act with us in the consideration and determination of the same, according to the provisions of the above-mentioned (*or* "within-contained") agreement of reference (*or* "bonds of submission," *or* "order of Nisi Prius"). As witness our hands the day of , A.D. .

E. F.
G. H.

Witness,

FORM XII.

NOTICE TO COMPANY OF APPOINTMENT OF ARBITRATOR BY CLAIMANT.

To the Company, and all others whom it may concern, I, the undersigned A. B., of , in the county of , send greeting.

Whereas I, the said A. B., am the owner (*or* "occupier") of (*here state the property in respect of which the claim arises, and the nature of the claim*): And whereas I did, on the day of , in pursuance of the powers and provisions of the said Act, give you the said Company notice in writing that I, as such owner (*or* "occupier") as aforesaid, demanded as and for compensation for such the sum of £ , and I in such notice desired, in the event of you the said Company being unwilling to pay the said sum, and of you the said Company being unwilling to enter into a written agreement for that purpose, within twenty-one days after the receipt of the said notice by you the said Company, to have the amount of such compensation settled by arbitration, according to the provisions of the Lands Clauses Consolidation Act, 1845: And whereas you the said Company have

not paid the said amount of compensation so claimed by me as aforesaid, and have neglected to enter into any written agreement to pay the said amount of compensation, although more than twenty-one days have elapsed since the receipt of the said notice by you the said Company, and have not agreed with me in the appointment of a single arbitrator to settle the same: Now therefore, know ye that I, the said A. B., for the purpose of causing all questions and disputes between me and you the said Company, respecting the said compensation so claimed by me as aforesaid, to be settled by arbitration, in pursuance of the said Act, and the provisions of the Lands Clauses Consolidation Act, 1845, and of the several other Acts incorporated with the said Act, do hereby, on my part and behalf, nominate and appoint C. D., of , in the county of , to be an arbitrator to settle and determine all the questions and disputes between you the said Company and me, respecting the said compensation so claimed by me as aforesaid, and to settle and determine the amount of such compensation to be paid by you the said Company to me, for (*here state the ground of claim, or continue,* "the damage I have sustained, and also the damage which I may sustain for or by reason of such injuries as aforesaid, or otherwise, by reason of the said works having been executed by you as aforesaid"), and to be an arbitrator, by me on my part hereby nominated and appointed to act in the business of the said arbitration, in all respects according to and in pursuance of the provisions of the said Acts, in, about, and for the settlement and determination of all questions, disputes, and matters respecting the premises aforesaid; and I hereby request you the said Company to nominate and appoint an arbitrator on your behalf, to act in respect of the compensation, damage, matters, and premises aforesaid.

Dated the day of , A.D. .

A. B.

FORM XIII.

APPOINTMENT FOR A MEETING.

A. B. } I appoint , the day of
v. } next, for proceeding in this reference, at the hour
C. D. } of o'clock, at (*here state the place of meeting*).

Dated

X.Y.,
Arbitrator.

To Mr. E. F., for A. B.;
and to Mr. G. H., for C. D.

FORM XIV.

NOTICE THAT ARBITRATOR WILL PROCEED EX PARTE.

A. B. } I appoint , the day of
v. } next, for proceeding in this reference, at the hour of
C. D. } o'clock, at (*here state the place of meeting*);
and I give notice that if you, A. B. (*or* "if either party"), fail to attend, without having previously shown me good and sufficient cause for your absenting yourself (*or* "for his absenting himself"), I shall, at the request of C. D., if (*or* "of the party") present, go on with the reference *ex parte*.

Dated the day of , A.D. .

X. Y.,
Arbitrator.

To Mr. A. B.
(*or* "to Messrs. A. B. and C.D.").

FORM XV.

DEMAND BY ARBITRATOR FOR PRODUCTION OF DOCUMENTS.

In the matter of the arbitration between A. B., C. D., and E. F.

SIR,

In pursuance of the power given to me by the order of reference (*or other submission, as the case may be*), I require you to produce before me, on , the day of next, at the hour of

o'clock, at (*here name the place of meeting*), the fo
documents relating to the matters in this referen
is to say (*here enumerate the books, deeds, pape
writings demanded, specifying and describing each
reasonable degree of particularity, as far as is pract
It may often be advisable to add,* "and also all other
deeds, papers, and writings, concerning the matte
difference referred to my decision").

Dated

To Mr. A. B.

X. Y.,
Arbitrator.

(*A copy of this notice should be served personally, as in
case of a demand of performance of an award, whenever th
is any doubt of the party's willingness to comply with it; f
the Courts, it is presumed, would not enforce obedience
attachment, unless there were a personal service with th
requisite formalities.*)

FORM XVI.

REQUEST BY ARBITRATOR FOR A WRITTEN STATEMENT OF THE MATTERS IN DIFFERENCE.

GENTLEMEN,

In order that in forming my award I may not omit duly to estimate every matter which is deemed of import- ance, I request you respectively to furnish me with a statement in writing of the particular matters (other than those included in the cause referred) which you desire me to take into my consideration as matters in difference in this reference.

Dated

Yours truly,
X. Y.,
Arbitrator.

To Mr. A. B. (*or* "to Mr. E. F. for Mr. A. B.")
and to Mr. C. D. (*or* "to Mr. G. H. for Mr. C. D.").

FORM XVII.

NOTICE BY ARBITRATORS TO UMPIRE OF FINAL DISAGREEMENT.

SIR,

We hereby give you notice that we cannot and shall not be able to agree in making an award, but have finally disagreed about the same, and that you are at liberty to proceed as umpire to consider and award upon the matters referred.

Dated .

E. F., G. H., } Arbitrators.

To Mr. X. Y., Umpire.

FORM XVIII.

ENLARGEMENT OF TIME BY ARBITRATOR.

I enlarge the time for making my award respecting the matters referred to me by the (*if the enlargement is endorsed on the submission, say*, "within order of reference," *or other submission; if it be written at the foot of the submission, say*, "above order of reference," *or other submission*), until the day of , A.D. .

Dated .

X. Y.,
Witness, O. P. Arbitrator.

FORM XIX.

REVOCATION OF SUBMISSION BY A PARTY.

Know all men by these presents, that I, A. B., of , have revoked, annulled, and made void, and by these presents do revoke, annul, and make void, all the power and authority which by a certain agreement of reference in writing, made the day of , A.D. , between me the said A. B. and C. D., of , were conferred upon X. Y., of , the arbitrator thereby appointed to award and determine on certain matters in

difference between me and the said C. D.; and I do hereby discharge and prohibit the said X. Y. from making any award, or from any further proceeding in the said arbitration.

As witness my hand (*if the submission be by bond or deed say*, "hand and seal"), this day of , A.D. .

A. B. (*if by deed, L.S.*)

Witness, O. P.

FORM XX.

NOTICE OF REVOCATION TO ARBITRATOR.

SIR,

I hereby give you notice that by a writing under my hand (*or* "hand and seal"), made on day of A.D. , I have revoked, annulled, and made void your authority as arbitrator; and I hereby discharge and prohibit you from further proceeding in the matters of the arbitration between me and C. D.

Dated .

To Mr. X. Y. A. B.

FORM XXI.

NOTICE TO PARTIES OF AWARD MADE.

GENTLEMEN,

I hereby give you notice that I have made and published my award in writing respecting the matters in difference between Mr. A. B. and Mr. C. D., referred to me, and that it lies at my chambers (*or other place specified*) ready to be delivered.

The charges amount to £ .

Your truly,
X. Y.,
Arbitrator.

To Mr. A. B. and Mr. E. F., for Mr. A. B.;
and to Mr. C. D. and Mr. G. H., for Mr. C. D.

FORM XXII.

AWARDS.

Commencement of an Award reciting Submission by Agreement or Deed.

Whereas by a certain agreement in writing (*or* "indenture"), bearing date the day of , A.D. , made between A. B., of , of the first part; and C. D., of , of the second part; reciting that (*here recite so much of the matters in difference as will explain and justify the subsequent directions of the award*), it was agreed that the same (*or* "that all matters in difference," *or otherwise according to the terms of the reference*) should be referred to the award and final determination of me, X. Y., of : And whereas it was further agreed that (*here set forth such of the several powers and provisions in the submission as warrant the following directions of the award*): Now I, the said arbitrator, having taken upon myself the burden of this reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, and documents which have been given in evidence before me, do hereby make and publish my award in writing of and concerning the matters above referred to me, in manner following, that is to say: I award and adjudge, &c.

Commencement of an Award reciting a Submission by Bond.

To all to whom these presents shall come, we, U. V., of , and X. Y., of , send greeting.

Whereas A. B., of , did by his bond, bearing date the day of , A.D. , become bound to C. D., of , in the penal sum of £ : and the said C. D., by his bond, also bearing date the day and year aforesaid, become bound to the said A. B. in the like penal

sum of £ , which bonds respectively recite that (*here set out so much of the recital in the bonds as suffice to show what is referred, and to explain the rest of the award*): Under which bonds conditions were respectively written for making the same void, if the said A. B. and C. D. respectively, and their respective heirs, executors, and administrators, should observe, perform, and keep the award which we the said arbitrators should make ("of and concerning the said matters referred," *or otherwise, according to the bonds*); so as we the said arbitrators should make and publish our award in writing, &c. (*as in Form II., altering the person and tense as far as the commencement of the provision respecting the umpire*); Now we, the said arbitrators, &c.

Commencement of Award by Umpire.

(*Recite the submission as to the appointment of the arbitrators, and the provision for appointing an umpire, and such other parts as may be necessary, and proceed*): And whereas the said U. V. and X. Y. did by a writing under their hands, bearing date the day of , endorsed on the said order of reference (*or, as the case may be*), appoint me, A. Z., of , to be the umpire, pursuant to the said order: And whereas the said U. V. and X. Y. did not make any award of and concerning the premises before the day of (*the limit of the arbitrator's authority, or, where there it no limit, say*—"And whereas the said U. V. and X. Y. have not made any award concerning the matters referred, but have finally and altogether disagreed respecting the same"): Now I, the said A. Z., having taken upon myself the charge of this reference, and having heard, examined, and considered the allegations, witnesses, and evidence of both the said parties concerning the premises, do make this my umpirage in writing of and concerning the premises, in the manner following, that is to say: I award and adjudge, &c.

Clauses as to Costs.

I award and direct that the defendant do pay to the plaintiff the costs incurred by the plaintiff of and incidental to the reference and award (*when the arbitrator is to ascertain the amount, add the following words:* "And I assess the amount of the said costs of the plaintiff at £ , and the costs of my award at £ "):

And I further award and direct that the plaintiff and defendant do each bear his own costs of the reference, and pay one-half the costs of the award; and that if either party shall in the first instance pay the whole or more than half of the costs of the award, the other party shall repay him so much of the amount as shall exceed the half of the said costs:

I award and direct that one moiety of the costs of the reference and award be borne and paid by A. B., and the other moiety by C. D.

ARBITRATION ACT, 1889.

[52 & 53 Vict. Ch. 49.]

Arrangement of Sections.

References by Consent out of Court.

Sect.

References under Order of Court.

General.

CHAPTER 49.

An Act for amending and consolidating the Enactments relating to Arbitration. [26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

References by Consent out of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the pro-

ceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

5. In any of the following cases :—

(*a.*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :

(*b.*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :

(*c.*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :

(*d.*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a.*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(*b.*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a judge may set aside any appointment made in pursuance of this section.

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(*a.*) to administer oaths to or take the affirmations of the parties and witnesses appearing; and

(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and

(*c.*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

8. Any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such

writ to produce any document which he could not be compelled to produce on the trial of an action.

9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.

10.—(1.) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

11.—(1.) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

13.—(1.) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2.) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

14. In any cause or matter (other than a criminal proceeding by the Crown),—

(*a.*) If all the parties interested who are not under disability consent: or,

(*b.*) If the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,

(*c.*) If the question in dispute consists wholly or in part of matters of account;

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

15.—(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury.

(3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

16. The Court or a judge shall, as to references under order of the Court or a judge, have all the powers which are by this Act conferred on the Court or a judge as to references by consent out of Court.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the Court.

General.

18.—(1.) The Court or a judge may order that a writ of subpœna ad testificandum or of subpœna duces tecum shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness, wherever he may be within the United Kingdom.

(2.) The Court or a judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

19. Any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

21. Provision may from time to time be made by Rules of Court for conferring on any Master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the Court or a judge.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire, shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court

or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer, without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act.

26.—(1.) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(2.) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

27. In this Act, unless the contrary intention appears,—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means Her Majesty's High Court of Justice.

"Judge" means a judge of Her Majesty's High Court of Justice.

"Rules of Court" means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

28. This Act shall not extend to Scotland or Ireland.

29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

30. This Act may be cited as the Arbitration Act, 1889.

SCHEDULES.

The First Schedule.

Provisions to be Implied in Submissions.

a. If no other mode of reference is provided, the reference shall be to a single arbitrator.

b. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

c. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

d. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

e. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

f. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which

during the proceedings on the reference the arbitrators or umpire may require.

g. The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

h. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

i. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15 -	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42. -	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 125. -	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66. -	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "Subject to any "Rules of Court" down to "as a "judgment by the "Court," both inclusive, and the words "special referees or". Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61. -	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

STATUTES BEARING ON THE QUESTION OF ARBITRATIONS.

SPACE will not allow, in a work of these dimensions, of copious extracts from Acts of Parliment, but it is hoped that the following table, naming the principal Acts which bear upon the subject, will be found useful as tending to facilitate reference :—

An Act to consolidate and amend the laws relating to the arbitration of disputes between masters and workmen, 1824 (5 Geo. IV. c. 9).

An Act to amend an Act of the 5th year of his Majesty King George IV. for consolidating and amending the laws relative to the arbitration of disputes between masters and workmen, 1837 (7 Will. IV. & 1 Vict. c. 67).

An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature (known as the Companies Clauses Consolidation Act), 1845 (8 & 9 Vict. c. 16).

An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of lands for undertakings of a public nature (known as the Lands Clauses Consolidation Act), 1845 (8 & 9 Vict. c. 18).

An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the making of railways (known as the Railways Clauses Consolidation Act), 1848 (8 & 9 Vict. c. 20).

An Act for promoting the public health (known as the Public Health Act), 1848 (11 & 12 Vict. c. 63).

An Act to amend the procedure in Courts of General and Quarter Sessions of the Peace in England and Wales, and for the better advancement of justice in cases within the jurisdiction of those Courts, 1849 (12 & 13 Vict. c. 45).

An Act to amend and consolidate the laws relating to bankrupts, 1849 (12 & 13 Vict c. 107).

An Act to amend the laws relating to the construction of build-

ings in the metropolis and its neighbourhood (known as th Metropolis Building Act), 1855 (18 & 19 Vict. c. 122).

An Act to amend the Public Health Act, 1848, and to mak further provision for the local government of towns and populo districts (known as the Local Government Act), 1858 (21 & 2 Vict. c. 98).

An Act to enable railway companies to settle their differenc with other companies by arbitration (known as the Railw Companies Arbitration Act), 1859 (22 & 23 Vict. c. 59).

An Act for consolidating in one Act certain provisions frequent inserted in Acts relating to railways (known as the Railw Clauses Act), 1863 (26 & 27 Vict. c. 92).

The Lands Clauses Consolidation Act, 1868 (32 & 33 Vi c. 18).

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